Petition

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

METROPOLITAN EDISON COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Metropolitan Edison Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit enforcing an order of the National Labor Relations Board against petitioner.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the National Labor Relations Board or a Circuit Court of Appeals have the authority to disregard a clear, unambiguous and repeated arbitral interpretation of a collective bargaining agreement and substitute its own, contrary interpretation?

2. May union officials be held to a higher duty than rank-and-file employees to uphold a collectively-bargained no-strike pledge, including an obligation to take affirmative steps to end any action in breach thereof, and does an employer commit an unfair labor practice by selectively disciplining union officials for failing to satisfy that duty?

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (A-1) is reported at 663 F.2d 478. The Decision and Order of the National Labor Relations Board (A-22) is reported at 252 N.L.R.B. 1030.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 9, 1981. Petitioner's request for rehearing en banc was denied by order of the Court of Appeals entered on January 5, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISIONS

National Labor Relations Act:

Section 8(a)(1), 29 U.S.C. §158(a)(1) (1976):

> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7;
>
> . . . ."

Section 8(a)(3), 29 U.S.C. §158(a)(3) (1976) [in pertinent part]:

> "(a) It shall be an unfair labor practice for an employer—
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
>
> . . . ."

STATEMENT OF THE CASE

On August 30, 1977, the Three Mile Island nuclear power station became embroiled in a labor dispute when 137 Metropolitan Edison Company[1] employees refused to report for work. All of them were disciplined, including union officials David Lang and Gene Light who received more severe punishment. The National Labor Relations Board ("Board") ruled such treatment of the union officials to be contrary to Section 8(a)(1) and (3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(a)(1) and (3) (1976). The United States Court of Appeals for the Third Circuit enforced the Board's order pursuant to its jurisdiction under 29 U.S.C. §160(e) and (f) (1976),[2] notwithstanding arbitration awards interpreting petitioner's collective bargaining agreement to permit such selective discipline of union officials.

A very recent decision of the United States Court of Appeals for the District of Columbia Circuit, *Fournelle v. NLRB*, No. 80-2211 (D.C. Cir., filed Feb. 2, 1982), reached the opposite result on facts indistinguishable from those here. As a result, the Courts of Appeals for the Third Circuit and the District of Columbia Circuit are in direct conflict regarding the effect to be accorded arbitral interpretations of collective bargaining agreements. The Third Circuit ruled that the Board or a court may disregard the consistent construction of a collective bargaining agreement that union officials have a special duty to adhere to the no-strike clause, and may substitute its own reading. The District of Columbia Circuit

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1. In accordance with Supreme Court Rule 28.1 Metropolitan Edison states that it is a wholly-owned subsidiary of General Public Utilities Corporation, as are Jersey Central Power and Light Company, Pennsylvania Electric Company, General Public Utilities Service Corporation and GPU-Nuclear Corporation.

2. In addition to petitioner and the Board, Local Union 563, International Brotherhood of Electricial Workers, as intervenor, was a party to the proceedings before the court below.

expressly held to the contrary — that the Board (or a court) is "not free either to ignore the meaning of the contract or to substitute its own interpretation of the contract for the interpretation of the arbitrator." *Fournelle*, slip op. at 28-29 (footnote omitted). It discussed the Third Circuit's view on this issue and rejected it in accordance with the precepts of the *Steelworkers Trilogy*.[3]

This petition also raises the issue as to whether an employer may impose a more severe penalty on union officials than on rank-and-file employees who violate a no-strike pledge, based on some higher duty of the officials to honor such a commitment and to make efforts to see that others do likewise. At present, there is much confusion among the circuits and the Board as to the existence and derivation of any such employer right. This important question of federal labor law ought to be settled by this Court.

The instant controversy grew out of a series of work stoppages at facilities operated by petitioner. Petitioner consists of four operating divisions which are divided into a total of five regions. A separate local of the International Brotherhood of Electrical Workers represents the production employees in each region. A council comprised of the five locals is designated as the sole and exclusive bargaining representative for a single, system-wide bargaining unit encompassing all of those employees. At all relevant times there was a single labor agreement which covered the entire bargaining unit.

On six occasions from 1970 through August 30, 1977, employees at individual facilities covered by the labor agreement engaged in work stoppages in violation of the no-strike clause. The pertinent contractual lan-

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3. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

guage has remained unchanged since before the first of those incidents. On each occasion petitioner disciplined union officials who participated in the strike more severely than the other employees involved. The incidents in 1972 and 1974 are of particular note because they led to arbitration awards (A-52; A-62) which sustained the harsher penalties levied upon the union officials and established that under the contract they have a duty to take affirmative steps to end illegal stoppages and to comply with the no-strike pledge themselves.

In 1972, approximately two hundred employees refused to begin work to protest disciplinary action taken against four employees the previous day. Among the protestors were three unon offcials. Whereas the rank-and-file employees involved were given written warnings, the union officials received three-day suspensions on the grounds that they had a greater responsibility to adhere to the contract. A challenge to that additional penalty was eventually referred to Arbitrator Wayne E. Howard who described the question before him as, "whether the more serious discipline assessed against the grievants by reason of their union position was proper." (A-58).

In sustaining the more severe penalty, Arbitrator Howard ruled that under the collective bargaining agreement the three union officials stood in a position different from that of other employees and had "an *affirmative duty* . . . to uphold the sanctity of the Agreement and its established grievance procedures. Failure to exercise this responsibility subjects them to more serious penalties." (A-60) (emphasis original; footnote omitted). Arbitrator Howard concluded that the grievants had failed to exert "every effort to halt the stoppage at the outset" and, more importantly, *"failed to demonstrate to the Company during the course of the stoppage that they were making such an effort."* (A-60) (emphasis original). Instead, he found that they had tried to bargain concessions from the company in ex-

change for an end to the walkout. Finally, he held: "Indeed, the mere *participation* by Union Leaders in an illegal work stoppage is sufficient to justify a differential penalty, particularly where, as here, the differential penalty, a three-day disciplinary layoff, was of relatively little magnitude." (A-60) (emphasis original).

In 1974, petitioner disciplined sixty-five employees for their participation in a contractually forbidden strike. Fifteen employees, for whom it was their first such violation, received written warnings. Forty-seven others were given one-day suspensions because they had been involved in a previous illegal stoppage. Three union officials were suspended for three days. The more severe discipline for the union leaders was challenged before Arbitrator Jacob Seidenberg who sustained it for one of the grievants, a senior shop steward, but reduced the discipline of the other two because, unlike the steward, they had tried to induce employees to return to work. Arbitratror Seidenberg concluded as to the steward that his conduct "was passive and ineffective and the Company could properly determine that he was guilty of failing to meet his responsibility as a senior Shop Steward to secure compliance with a significant and meaningful contract provision." (A-71). The harsher sanction imposed upon him was, therefore, permissible and not discriminatory.

As noted, the work stoppage which spawned the present dispute occured on August 30, 1977, at petitioner's Three Mile Island facility. Most of petitioner's union employees refused to cross a peaceful, informational picket line established by the Operating Engineers Union in connection with a dispute between it and a contractor working on new construction at the site. After reviewing the conduct of all of the employees involved, which the parties stipulated was unlawful, petitioner imposed different measures of discipline. One hundred twenty-one first-time offenders received five-day suspensions and fourteen repeat offenders received ten-day

suspensions. The two union officials, Lang and Light, received twenty-five day suspensions, the additional penalty being based on their failure to make any effort to prevent or end the work stoppage or to report for work themselves.

The record shows that neither Lang nor Light directed or urged the employees to report for work, despite repeated requests from management personnel that they do so. Responding to those requests, both men stated that neither they nor their members would go to work as long as the picket line was present. The only steps Lang or Light took to resolve the situation were directed to inducing petitioner to take actions which in their opinion might lead to removal of the picket line. Only after the picket line disbanded later in the day did they and the other employees report for work. No doubt recognizing the binding effect of the prior arbitration awards and knowing that it would surely lose before an arbitrator, the union instead challenged the additional penalty imposed on Lang and Light by filing an unfair labor practice charge with the Board alleging a violation of Section 8(a)(1) and (3) of the NLRA.

A bit of additional background is necessary to complete the setting of this case. In 1973, all of the union employees at Three Mile Island engaged in an illegal strike. The rank-and-file employees were given five-day suspensions, later reduced to one day. The union officials involved, including Lang and Light, for the same reasons their more severe penalty was imposed in this case, were given twenty-five-day suspensions, later reduced to five days. Although the union challenged two other instances of discipline arising out of the 1973 strike, it did not challenge the greater punishment suffered by the union officers.

There was also a brief incident at Three Mile Island about four weeks before the stoppage at issue here, involving a similar refusal to cross a construction union picket line. The employees involved, who reported

promptly after the situation was resolved, including Lang and Light, were not disciplined. Those who reported later were suspended for one day. On a number of occasions between that episode on August 4, 1977, and the date of the strike here, August 30, 1977, petitioner's representatives personally admonished Lang and Light that as union officials they had a special duty (under the previous arbitration awards) to uphold the labor agreement, including an obligation to set an example by reporting for work.

REASONS FOR ALLOWING THE WRIT

I. The Decision Below Conflicts with a Decision of the United States Court of Appeals for the District of Columbia Circuit with Respect to the Authority of the NLRB or a Court to Substitute Its Interpretation of a Collective Bargaining Agreement for that of an Arbitrator.

Both this case and *Fournelle v. NLRB*, No. 80-2211 (D.C. Cir., filed Feb. 2, 1982), involved work stoppages in violation of contractual no-strike clauses. In both instances, the employer disciplined the participating union officials more severely than the rank-and file employees, although the language of neither contract expressly imposed on such officials any greater duty to observe or seek compliance with the no-strike pledge. In both cases, however, the employer relied on previous arbitration awards which recognized that union officials did have a higher responsibility than other employees to attempt to ensure or procure compliance by bargaining unit members. Nevertheless, the Board ruled that the employers violated Section 8(a)(1) and (3) of the NLRA, without even considering whether there were contractual grounds for more severely penalizing the officials.[4]

On review, the two circuit courts rejected the Board's *per se* rule and held that the parties to a collective bargaining agreement may impose on union officials a special duty to comply with a no-strike pledge and to attempt to halt an illegal stoppage. For breach of that duty an official may be selectively disciplined. (A-5 — A-6); *Fournelle*, slip op. at 21. They parted company,

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4. The Board applied the *per se* rule against selectively disciplining union officials which it annouced in *Precision Castings Co.*, 233 N.L.R.B. 183 (1977), and reiterated in *Gould, Inc.*, 237 N.L.R.B. 881 (1978), *enforcement denied*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980). *See* discussion at pp. 16-17 *infra*.

however, as to whether the contract must contain explicit language (imposing the duty) or whether an arbitral interpretation of the agreement can establish that more stringent obligation.

The Third Circuit summarily cast aside the construction of the instant agreement which was applied in separate cases by Arbitrators Howard and Seidenberg. The majority of the divided panel held that it was not bound by the previous arbitral interpretation, reasoning that, absent a specific contractual clause, an *arbitrator* normally "need not follow previous arbitrations construing the same agreement;" therefore, "when this *court* is called upon to construe a collective bargaining agreement, it need not follow a previous arbitral interpretation." (A-11) (emphasis added).[5] To buttress its conclusion, the court argued that to so bind it would be inconsistent with the parties' bargain for "arbitration as a dispute resolution process for specific grievances." (A-11).

Those views are plainly mistaken as they conflict head-on with fundamental federal labor policy under which arbitrators are given the task of filling in the inevitable gaps in collective bargaining agreements. The District of Columbia Circuit's summary of that policy and its

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5. The court below attempted to dismiss the arbitration awards as merely determining whether there was just cause to discipline the union officials involved. The court suggested that, therefore, neither arbitrator actually determined whether the collective bargaining agreement placed greater responsibilities on the union officials.

The District of Columbia Circuit addressed and rejected a similar argument in *Fournelle*, slip op. at 23-24. Necessarily subsumed in a determination of just cause under the circumstances is the determination that there is some special obligation on the officials which permits them to be selectively disciplined. Indeed, Arbitrators Howard and Seidenberg both expressly found that such obligations did exist under petitioner's contract. Thus, there is no question but that under that contract union officials are held to a higher degree of responsiblity than rank-and-file employees for compliance with its terms.

underpinnings, as articulated by this Court in the *Steelworkers Trilogy*, bears repeating:

> The Supreme Court recognized in the *Steelworkers Trilogy* that arbitration is an essential part of the collective bargaining process. The Court explained in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960), that "[a] collective bargaining agreement is an effort to erect a system of industrial self-government." Because of the complexity of the relationship between union and employer, and because of the overriding need of the parties to reach an agreement, "[g]aps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreenment." *Id.* Unlike commercial arbitration, where arbitration may be a symptom of the breakdown of the parties' relationship, "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government." *Id.* at 581. "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Id.* Thus the arbitrator's rulings may be as important a source of the rights and obligations of the parties as the contractual document itself. Moreover, "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 581-82.

Fournelle, slip op. at 26-27.

Based on those principles, the District of Columbia Circuit rejected the reasoning of the Third Circuit in this case and, contrary to it, found that an arbitral interpretation of a collective bargaining agreement is binding on

the Board and courts. The District of Columbia Circuit said:

> The question here is whether, on the one hand, the Board and courts should read the agreement in accordance with the clear ruling of the arbitrator or, on the other hand, should substitute their interpretation for the arbitrator's. We conclude . . . that the Board erred in ignoring the arbitral interpretation of the contract.

Fournelle, slip op. at 26.

The District of Columbia Circuit also pointed out the fallacy of the premises upon which the Third Circuit relied. It found no merit in the view that, because an arbitrator may not be absolutely bound by a prior arbitral award, the Board or a court is not bound. Discussing authority cited by the Third Circuit, it observed:

> We do not hold that the parties to the collective bargaining agreement in the present case are precluded from arguing in subsequent arbitrations that the arbitrator's earlier award was erroneous. Just as in the judicial sphere the evolution of common law may require a court to hold that earlier cases were in error, so an arbitrator may decline to follow arbitral precedent when his judgment is that earlier decisions are erroneous. *But that does not give the Board the power to make such a judgment for the arbitrator.*

Fournelle, slip op. at 26 n.22 (emphasis added). Regarding the notion that, absent explicit contractual language, an arbitration award is not binding beyond the grievance it resolves, the District of Columbia answered:

> To put it succinctly: "[a]n award interpreting a collective bargaining agreement usually becomes a binding part of the agreement and will be applied by arbitrators hereafter." F. Elkouri & E. Elkouri, *How Arbitration Works*, 377 (1973) (footnote omitted).

> Thus, it is simply inconsistent with the realities of labor arbitration to maintain that, without an express contractual term giving the results of past arbitrations precedential effect, the arbitrators' rulings are isolated utterances without a general application to the ongoing collective bargaining relationship.

Fournelle, slip op. at 27.[6] It further observed:

> The parties to the collective bargaining agreement in the present case would no doubt be highly displeased if arbitral *stare decisis* were as inconstant a doctrine as Fournelle and the Board would have us believe. The whole function of arbitration as a "vehicle by which meaning and content are given to the collective bargaining agreement" would be impaired if the parties could not rely on a settled construction of their agreement.

Fournelle, slip op. at 28.[7] Finally, in counterpoint to the Third Circuit here, *Fournelle* held that "the collective

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6. In support of its premise that an arbitration award is not binding absent express contract language to that effect, the Third Circuit referred to a provision in petitioner's agreement which states that an arbitration decision "shall be binding . . . for the term of this Agreement." (A-11). Thus, it argued, an award is effective only for the period of the agreement under which it was rendered. That position is contrary to the interpretation implicitly accorded that language by Arbitrator Seidenberg who adopted the earlier interpretation rendered by Arbitrator Howard during a previous term of the agreement. As with the main issue here, the arbitrator's view of the precedential effect of a prior decision must prevail over the court's.

The court below also cited a provision in the contract that "all Customs and Practices" between the parties are to be listed therein. (A-11). Suffice it to say that an arbitration award is not a custom or practice, but is a part of the agreement in the first instance. It needs no incorporation.

7. The precedential effect of the Howard and Seidenberg awards here is further buttressed by the fact that the labor agreement has been twice renegotiated since the later of them without a material change in the pertinent language. Such renegotiation

bargaining agreement, including the authoritative interpretation of the arbitrator, imposes special duties on union officials during unauthorized strikes and permits the employer's selective punishment of union officials who flout those duties." *Id.*, slip op. at 29.

Analysis of the decision below and that of the District of Columbia Circuit in *Fournelle* reveals that only the *Fournelle* view of the role and long-term impact of arbitration is consistent with the scheme of the *Steelworkers Trilogy*. As Justice Douglas said in *Steelworkers v. Enterprise Wheel & Car Corp.*:

> As we there *[Steelworkers v. American Manufacturing Co.]* emphasized the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

363 U.S. at 599. *C.f. NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953) (reversing the Board, this Court accepted an arbitration panel's interpretation of the no-strike clause as an integral part of the collective bargaining agreement).

The practical effect of the decision below would be to force the parties to reintroduce into contract negotiations each arbitration award made during the term of the expiring agreement in order to assure that it did not

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without change is generally recognized to strengthen the binding force of an award. As this Court observed in similar circumstances: "If these interpretations did not accord with the parties' understanding of their contract, they had ample opportunity to make their own understanding explicit. Failure to do strongly suggests the parties incorporated the courts' interpretation of the agreements." *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 222 (1979). *See Elkouri & Elkouri, supra* 378-79 and nn. 49 and 50.

lapse. Union negotiations in contemporary times are difficult enough without injecting for discussion matters which have already been settled under the contract. Both labor and management commonly assume that, absent a change in the pertinent contract language, an interpretation made by an arbitrator remains in effect and becomes part of the agreement. If one of the parties seeks to alter that interpretation, it is incumbent upon it to propose a change in future negotiations. The inevitable result of the Third Circuit's denigration of arbitration awards not only is antithetical to the philosophy and goals of the *Steelworkers Trilogy*, it is starkly inconsistent with the realities of collective bargaining. If allowed to stand, it will inexorably subvert the collective bargaining relationship between petitioner and its employees' union.

The obvious error of the Third Circuit in this case aside, there exists a direct, irreconcilable conflict between its decision and that of the District of Columbia Circuit in *Fournelle*. They have taken opposite sides of a question which is fundamental to the system of collective bargaining and private resolution of disputes through binding arbitration which forms the foundation of national labor policy. At issue is the efficacy of arbitration as a long-term stabilizing force in the conduct of day-to-day labor relations.

II. An Important Question of Labor Law Exists which this Court Should Settle Concerning the Duty of Union Officials to Honor and Enforce a No-Strike Pledge.

In *Precision Castings Co.*, 233 N.LR.B. 183 (1977), the Board reversed course with respect to an employer's right to discipline union officials selectively. Previously, it had ruled that Section 8(a)(3) was not violated when an employer penalized union officials more severely than rank-and-file employees for participating in an unlawful strike. *See, e.g., Chrysler Corp.*, 232 N.L.R.B. 446

(1977); *Super Valu Xenia*, 228 N.L.R.B. 1254 (1977); *Russell Packing Co.*, 133 N.L.R.B. 194 (1961); *University Overland Express, Inc.*, 129 N.L.R.B. 82 (1960); *Stockham Pipe Fittings Co.*, 84 N.L.R.B. 629 (1949). As became clear in *Gould, Inc.*, 237 N.L.R.B. 881 (1978), *enforcement denied*, 612 F. 2d 728 (3rd Cir. 1979), *cert. denied*, 449 U.S. 890 (1980), the Board embraced precisely the opposite view in *Precision Castings* — that union officials cannot be selectively disciplined for an illegal stoppage, even if the contract explicitly imposes additional responsibility on them.

To date, each of the courts of appeals which have considered the Board's *Precision Castings* rule — the Third, Seventh, Eighth and District of Columbia Circuits — have flatly rejected it, although they have articulated divergent standards.

The Seventh Circuit was the first to consider the Board's new *per se* rule. In *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979), it suggested that the higher responsibility of union officials arises as a matter of law and ruled that, while more severe discipline may not be based merely on an official's status as such, it may be based on a failure to satisfy the greater obligations attendant to that status. Subsequently, in *C. H. Heist Corp. v. NLRB*, 657 F. 2d 178 (7th Cir. 1981), another panel of that court appeared to move toward the view that there must be at least some contractual basis, however tenuous, for its existence;[8] if, however, the duty is to include an obligation to attempt to cross a picket line, there must be clear contractual language to that effect. *Id.* at 183.

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8. For example, in *Indiana & Michigan Electric*, the contract, in addition to a typical no-strike pledge, stipulated that "employees . . . will not be called upon or permitted to cease or abstain from the continuous performance of [their] duties. . . . " 599 F. 2d at 228. In *Heist*, the contract specified that "[t]he steward's duties shall consist of seeing that all terms and conditions of the Agreement are being complied with. . . . " 657 F.2d at 181.

The Third Circuit's position is more restrictive than that of the Seventh Circuit, or those of the Eighth and District of Columbia Circuits which are discussed below. In *Gould, Inc. v. NLRB*, 612 F. 2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980), the Third Circuit adopted the reasoning of the Seventh Circuit in *Indiana & Michigan Electric*. It also found that the Gould collective bargaining agreement specifically imposed a higher duty on union officials which, if breached, gave the employer the right to punish them more severely than other illegal strikers. In *Hammermill Paper Co. v. NLRB*, 658 F. 2d 155 (3d Cir. 1981), the Third Circuit made clear that in its view any such increased responsibility does not arise purely by operation of law but must have a basis in the contract. In the present case, the Third Circuit narrowed its approach even more, explicitly stating that it will recognize and permit added responsibility and discipline to be imposed on union officials only where there is "clear [contractual] language showing that the union agreed to it." (A-9).

Contrasting with the position espoused by the Third Circuit, which may be evolving in the Seventh Circuit, the Eighth Circuit has accepted the broadest reasoning of *Indiana & Michigan Electric* and held that inherent in a union official's position is a greater duty to uphold the provisions of a collective bargaining agreement, even in the absence of special contract language. Hence, a union leader is more at fault in failing to adhere to and enforce a no-strike pledge and may be more severely punished. Silent acquiescence during an illegal strike breaches that greater responsibility. *NLRB v. Armour-Dial, Inc.*, 638 F. 2d 51 (8th Cir. 1981).[9]

9. In *Fournelle*, slip op. at 15 n. 15, the District of Columbia Circuit characterized *Armour-Dial* as holding that a contractual basis for imposing higher responsibility on union officials is apparently unnecessary when they act as strike leaders. Although the Eighth Circuit couched its conclusion in such terms, the actual conduct of the union officials in question was limited to sitting by silently while the union president threatened a work stoppage.

The most recent appellate decision on this issue is that of the District of Columbia Circuit in *Fournelle*. Because of its ruling that the contract before it addressed the matter by virtue of the arbitrator's award, the court expressly declined "to decide whether an employer may selectively discipline a union official in a situation where the collective bargaining agreement is neutral on the question (i.e., the contract contains only a *general* no-strike clause). . . . " *Id.*, slip op. at 14 (emphasis original). The differences between the District of Columbia Circuit's views and those of the Third Circuit are discussed earlier in this Petition (at pp. 10-16).

It is evident that the current state of the law in this area is extremely confused. Under the Board's view, explicit contract language to the contrary notwithstanding, a union official cannot be held to a higher standard than a rank-and-file employee in complying with a no-strike pledge and in seeing that others do likewise.[10] The Third Circuit will hold a union official to a higher standard, but only if there is "clear contractual language showing that the union agreed to the added responsibility." One panel of the Seventh Circuit has suggested that an official has a heavier burden regardless of the language in the contract, while another, later panel, seems to require at least some contract provision, but, except with respect to an obligation to cross a picket line, not couched in language as compelling as that required by the Third Circuit. The Eighth Circuit has required no special contract language at all in order to hold union officials to a higher degree of accountability.

Especially, as here, in an illegal sympathy strike situation where injunctive relief is unavailable,[11] an em-

10. As noted in *Fournelle*, slip op. at 17, the Board may be modifying its *per se* rule. In its decision in *Armour-Dial*, 245 N.L.R.B. 959, 960 n. 8 (1979), the Board noted that the no-strike clause there imposed no higher duties on union officials; therefore, it declined to reach the issue of whether a union could agree that union officials could be selectively disciplined for breach of that provision.

11. *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976).

ployer's ability to impose discipline is the only effective lever he has to enforce compliance with a no-strike pledge.[12] In particular, the exigencies facing the nuclear power industry in fulfilling its duty to provide an uninterrupted flow of electricity to tens of millions of people under the safest possible conditions require that it be able to rely on and effectively enforce the no-strike pledges of its employees.

It has long been recognized that an employer may selectively discipline employees who are involved in an illegal stoppage and may impose more severe discipline on those who are more culpable. *See, e.g., Stockham Pipe Fittings Co.*, 84 N.L.R.B. 629 (1949). It is essential, then, that employers be given clear, authoritative and uniform guidelines as to the obligations of union officials in such situations and an employer's right to impose more severe penalties on them for breaching that duty. This is an important question of federal law which has not been, but should be, settled by the Supreme Court in order to resolve the present confusion and inconsistencies among the Board and the Courts of Appeals for the Third, Seventh, Eighth and District of Columbia Circuits.

CONCLUSION

A direct conflict exists between the decision of the Court of Appeals for the Third Circuit below and the decision of the Court of Appeals for the District of Columbia Circuit in *Fournelle v. NLRB*. The Third Circuit has held that the Board and courts may disregard a clear, consistent arbitral construction of a collective bargaining agreement that union officials have a special duty to

12. A damage action against the union, with the attendant proof problems as to its liability, *Carbon Fuel Co. v. United Mineworkers*, 444 U.S. 212 (1979), is generally ineffective to discourage an illegal strike. And, of course, individual employees cannot be held answerable in damages. *Complete Auto Transit, Inc. v. Reis*, 101 S. Ct. 1836 (1981).

adhere to a no-strike clause, while the District of Columbia Circuit has taken the opposite view — that the Board and courts are bound by such an interpretation and may not substitute their own reading of the contract for that of the arbitrator. This case should be accepted for review so that this Court may resolve that conflict.

This case should be reviewed for the additional reason that there exists an important question of federal labor law which this Court should settle concerning the circumstances under which an employer may selectively discipline union officials for breaching a no-strike clause. At present the Board and Courts of Appeals for the Third, Seventh, Eighth and District of Columbia Circuits have taken varying and inconsistent positions on that issue.

Thus, a Writ of Certiorari should issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: March 4, 1982

Appendix

81-1664

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

METROPOLITAN EDISON COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2588

METROPOLITAN EDISON COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

LOCAL UNION 563, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS,
Intervenor

PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
Board No. 4-CA-9144

Argued July 14, 1981

Before: SEITZ, *Chief Judge*, VAN DUSEN and
HIGGINBOTHAM, *Circuit Judges*

(Filed November 13, 1981)

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OPINION OF THE COURT

SEITZ, *Chief Judge*.

Metropolitan Edison Company (the Company) petitions for review of an order of the National Labor Relations Board (the Board) finding that the Company violated section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by disciplining two officers of intervenor Local Union 563 (the Local) more severely than rank-and-file members for participating in an illegal work stoppage. The Board cross-petitions for enforcement of its order. This court has jurisdiction under section 10(e) and (f) of the Act, as amended, 29 U.S.C. §160(e) & (f) (1976).

I.

The Company, a public utility that provides electrical power to customers in Southeastern Pennsylvania, started construction of a two-unit nuclear generating station at Three Mile Island (TMI) in 1968. The construction was still underway in 1977. At that time, over half of the Company's employees were represented by five local unions of the International Brotherhood of Electrical Workers (the Union) under a collective bargaining agreement that took effect on May 1, 1976. Article XI of the agreement provided:

> The Brotherhood and its members agree that . . . there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public.

Under prior collective bargaining agreements containing the same provision, members of the Union had violated the no-strike provision four times. On each occasion the Company disciplined the Union officers more severely than its members. The Company justified the disparity in discipline on the ground that union officers, unlike the members, have an affirmative duty to try to end an illegal strike. Twice the Union grieved to arbitration the issue of whether the Company could impose the extra discipline, and twice the Union lost.

The events that gave rise to this dispute occurred on August 30, 1977. Members of the Operating Engineers' Union picketed the north entrance to TMI. Members of the Local, including its president Lang and vice-president Light, refused to cross that picket line. The administrative law judge succinctly described the events on that morning:

> Both [Lang and Light] spent the morning of August 30, 1977, seeking to secure removal of the picket

line so that their members, who had earlier indicated an unwillingness to cross any picket line, would go to work. Thus, Lang had come to [TMI] early on the morning of August 30, pursuant to a phone call from [the Company's personnel administrator], in which [he] advised [Lang] that there was a picket line which the [Local's] members were refusing to cross and requested him to see what could be done. In the course of their conversations that morning, [the administrator] reiterated to Lang a position taken by the Company a number of times previously that the union officers had a particular obligation to cross the picket line so that other employees would follow. When Lang arrived at the gate he spoke to the Operating Engineers' picket captain, learned the reason for the picket line, and was told that the line would not be removed unless removal was ordered by his business agent. Lang called the business agent. Subsequently, Lang went to the union hall, . . . and directed Gene Light to go to the Operating Engineers to see whether he could negotiate with them to get them off the bridge. When he returned to the picket line, Lang was again told [by two Company officers] that he had a particular obligation as a union official to cross the picket line. Lang told [one of them] that it was the consensus of the members that they were not going to cross until the picket line came down and he told [the other] that he felt it was better if he stayed out because then he could at least negotiate with the pickets. Gene Light had substantially similar conversations with both [officers].

In the course of discussing what it would take to have the picket line removed, the Operating Engineer's steward told Lang that they would remove the picket line if the contractors ceased using the north bridge.

After Lang related this conversation to the Company's coordinator of services, the Company set up a reserved gate for the contractor's employees at the south bridge, the picket line came down, and the Local's members went to work.

Of the 135 rank-and-file members who refused to cross the picket line, 121 received five-day suspensions, and fourteen who had participated in previous illegal stoppages received ten-day suspensions. Lang and Light each received a twenty-five-day suspension. The Company stated in the written records of its disciplinary action that the harsher discipline for each was justified because in addition to violating the no-strike clause, each had

> [failed] as an elected official of [the Local] to demonstrate to the Company, in an objective manner [his] affirmative duty as an elected officer to:
>
> (a) Make every effort to uphold the sanctity of the Agreement and its established grievance procedures.
>
> (b) Make every bona fide effort to prevent the unlawful work stoppage.
>
> (c) Make every effort; including returning to work [himself], to end the unlawful work stoppage.

The Local filed an unfair labor practice charge, and the General Counsel issued a complaint against the Company. The administrative law judge found that the Company's actions violated section 8(a)(1) and (3) of the Act, and the Board adopted his rulings, findings, and conclusions, although modifying the terms of his cease and desist order. *Metropolitan Edison Co.*, 252 N.L.R.B. 1030 (1980).

II

An employer may impose greater discipline on union officials if the collective bargaining agreement

enumerates specific affirmative steps a union official is to take in the event of an illegal work stoppage and the official has failed to perform those actions. In *Gould Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979), *cert. denied sub nom. Moran v. Gould Corp.*, 449 U.S. 890 (1980), this court held that an employer did not commit an unfair labor practice when it singled out from among fifty participants in an illegal work stoppage a union steward for discharge. The collective bargaining agreement contained a no-strike clause, and also required union officials to take affirmative steps to end illegal work stoppages:

> In the event of an illegal [work stoppage], the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following: Within not more than twenty-four (24) hours after the occurrence of any such unauthorized action, the Union, its officers and representatives shall publicly disavow same by posting a notice on the bulletin boards throughout the plant. The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence of any wildcat picket line. The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action. The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.

612 F.2d at 730 n.3. The court held that the employer's discharge of the steward did not discriminate against the exercise of protected section 7 concerted activities because the company disciplined the steward not because of his status as a union officer but because of his failure to fulfill the responsibilities imposed on him by the collective bargaining agreement. The court further held that the discharge of the steward for violation of that contractual duty was not inherently destructive of em-

ployee rights and thus an unfair labor practice under the doctrine of *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), because (1) there is no right to strike illegally or to violate contractually imposed duties, and (2) anyone dissuaded from seeking union office by such a rule should be dissuaded if he or she intended to engage in illegal strikes or to violate contractual obligations. *Id.* at 730-33.

If the collective bargaining agreement requires in general terms that union officials take affirmative steps to end an illegal work stoppage, a union official does not breach that duty simply because he does not take the exact affirmative steps the employer ordered him to take. Only if his actions in complying with that duty are not in good faith does he become subject to greater discipline. In *C.H. Heist Corp. v. NLRB*, 657 F.2d 178 (7th Cir. 1981), an employer discharged only one out of twenty-five employees who participated in an illegal work stoppage — the shop steward. There was a no-strike provision in the collective bargaining agreement. The court held that the only basis for finding a greater obligation on the steward than on the other employees was a provision that, "The steward's duties shall consist of seeing that all terms and conditions of the Agreement are being complied with . . . ." *Id.* at 181. The steward, both before and during the work stoppage, attempted to dissuade the employees from striking, but would not cross the picket line as the employer wanted him to do. The court held that the employer had committed an unfair labor practice in more harshly disciplining the steward, because "[i] in the absence of a clear contractual provision requiring [the steward] to cross the picket line, his efforts were sufficient, if not the most effective possible, to satisfy his obligation to see that the no strike clause was complied with." *Id.* at 183.

If the collective bargaining agreement does not specify that union officials have some responsibility to try to end an illegal work stoppage, then the company

may not impose any greater discipline on union officials than on other participants in the strike. In *Hammermill Paper Co. v. NLRB*, 658 F.2d 155 (3d Cir. 1981), an employer had punished a union steward who took part in an illegal work stoppage more severely than other participants. The collective bargaining agreement contained a general no-strike clause. However, the *Hammermill* agreement contained no provision that placed any greater responsibilities on union officials than on the rank-and-file members, and the arbitrator in a grievance proceeding on the same matter had held that the contract placed no increased responsibilities on union officials. In those circumstances, the two members of the panel who reached the issue held that the company had committed an unfair labor practice in singling out the steward for harsher punishment. *Id.* at 163 (opinion of Rosenn, J.); *id.* at 166-67 (opinion of Higginbotham, J.).[1]

The rules developed from the *Gould*, *Heist*, and *Hammermill* cases are consonant with sound labor policy. The rules recognize the principle that although statutory rights may be waived, courts will generally not find a waiver unless it is clear and unmistakable. *See Texaco, Inc. v. NLRB*, 462 F.2d 812, 815 (3d Cir.), *cert. denied*, 409 U.S. 1008 (1972). The rules recognize that, since the holding of union office is the essence of protected union activities, *see General Motors Corp.*, 218 N.L.R.B. 472, 477 (1975), *enforced mem.*, 535 F.2d 1246 (3d Cir. 1976), discriminatory punishment solely on the basis of holding union office is a section 8(a)(3) unfair labor

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1. To the extent that *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979), is inconsistent with *Gould*, *Heist*, and *Hammermill*, we decline to follow it. *See Hammermill*, 658 F.2d at 163-65 (opinion of Rosenn, J.) (distinguishing *Indiana*); *id.* at 167 (opinion of Higginbotham, J.) (rejecting *Indiana*). We also note that the Court of Appeals for the Seventh Circuit appears to have limited the scope of the *Indiana & Michigan* decision. *See Heist*, 657 F.2d at 182-83.

practice.[2] *Hammermill,* slip op. at 17 (opinion of Rosenn, J.); *id.* at 23-26 (opinion of Higginbotham, J.). Although it is true that we need not hesitate to adopt a rule that allows union officials to be punished discriminatorily if such a ruling would deter prospective union officials from seeking union office because they intend after assuming office to participate in illegal work stoppages and to repudiate voluntarily assumed contractual obligations, *see Gould,* 612 F.2d at 733, this case illustrates the limits of that rationale. Allowing the discriminatory punishment that the Company imposed on Lang and Light might deter others from seeking union office because of the fear that, if an illegal strike were to occur, they would be put into an untenable position: either obey the company and lose their authority,[3] or follow their own judgment and risk harsher punishment. It is because of this dilemma that we will not interpret a collective bargaining agreement to impose additional responsibilities on union officials absent clear language showing that the union agreed to it. *Compare Heist,* 657 F.2d at 182-83 (similar analysis where agreement did not specify what responsibilities it imposed on union official).

Because the agreement here, like that in *Hammermill,* did not expressly impose a duty on the Union officials to attempt to halt an illegal work stoppage, the Company committed an unfair labor practice

---

2. If union officials take a leadership role in support of an illegal work stoppage, then they may be more severely disciplined for that reason. *See J.P. Wetherby Construction Co.,* 182 N.L.R.B. 690 (1970).

3. This possibility was demonstrated on August 4, 1977. That morning, members of the Local had refused to cross the picket line established by the Pipefitters' Union at the north entrance to TMI. After this incident the Company advised Lang and Light that they had a legal obligation to cross the picket line and to urge their membership to do the same. At a meeting after work on August 4, Lang told the members of their obligations, but the membership shouted down his urgings that they cross picket lines.

when it disciplined Lang and Light more harshly than the other participants in work stoppage of August 30.

III.

The Company argues that, notwithstanding the absence of any explicit contractual language placing greater responsibilities on the Union officials, two earlier arbitrations had interpreted identical language in previous collective bargaining agreements between the Company and the Union to require Union officials to take affirmative steps to end an illegal work stoppage. Because the relevant language was not changed in any of the renewals since the time of those decisions, the Company argues that we are bound by the arbitral awards construing the collective bargaining agreement to place greater responsibilities on union officials.

There are two arbitration awards on which the Company relies: the Howard arbitration in 1973 and the Seidenberg arbitration in 1975. Both arbitrations arose out of illegal work stoppages in which the Company had disciplined union officials more severely than rank-and-file members. Both times the issue before the arbitrator was whether the company had had just cause for the discipline. In neither hearing did the Union raise the issue whether the collective bargaining agreement placed greater responsibilities on the Union officials. The only discussion of the origin of the greater responsibilities occurred in the Howard arbitration. The arbitrator stated:

> It is well-established that Union officials have an *affirmative duty* to protect the authority of the Union leadership from illegitimate action on the part of employees, and to uphold the sanctity of the Agreement and its established grievance procedures. Failure to exercise this responsibility subjects them to more serious penalties. . . . Indeed, the mere *participation* by Union leaders in an illegal work stoppage is sufficient to justify a differential penalty . . . .

(emphasis in the original).

The narrow issue before us is whether we are bound by the previous arbitral interpretations. We hold that we are not.[4]

Normally an arbitrator need not follow previous arbitrations construing the same agreement. *See New Orleans Steamship Association v. General Longshore Workers,* 626 F.2d 455, 468 (5th Cir. 1980), *cert. granted sub nom. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association,* 101 S. Ct. 1737 (1981) (No. 80-1045); *Riverboat Casino, Inc. v. Local Joint Executive Board,* 578 F.2d 250, 251 (9th Cir. 1978) (to require adherence to previous arbitration would reduce flexibility of the arbitral process). It follows that when this court is called upon to construe a collective bargaining agreement, it need not follow a previous arbitral interpretation. To bind this court to a contractual interpretation made in a previous arbitral award would not be consistent with what the parties bargained for: arbitration as a dispute resolution process for specific grievances. *See NLRB v. Pincus Brothers, Inc.-Maxwell,* 620 F.2d 367, 374 (3d Cir. 1980).

An exception to the general rule may be found if the collective bargaining agreement so provides. *Riverboat Casino,* 578 F.2d at 251. However, that exception is not applicable here, because the agreement between the Company and the Union does not provide that one arbitration is to be bound by an earlier decision, unless the earlier decision was made under the same collective bargaining agreement. Article IX, §9.2 4th ("A decision [by an arbitrator] shall be binding . . . for the term of this Agreement."). The two arbitrations upon which the

4. The administrative law judge held that he was not bound to the previous interpretations because, if they had been made today, the Board "would *likely* find those awards repugnant to the purposes and policies of the Act." 252 N.L.R.B. at 1035 (emphasis added), under the analysis of *Spielberg Manufacturing Co.,* 112 N.L.R.B. 1080 (1955). Because we reach the same result on other grounds, we do not decide whether the conclusory *Spielberg* analysis was correct.

Company relies were made under previous agreements. Additionally, the agreement provides that "all Customs and Practices" between the Company and the Union are to be listed in the agreement. The agreement lists no practice of being bound to arbitrations under previous agreements.

IV.

The Company further argues that its harsher discipline of Lang and Light was justified because Lang and Light were leaders of the strike. *See J.P. Wetherby Construction Co.*, 182 N.L.R.B. 690 (1970). The Board rejected this argument, finding that Lang and Light were not active leaders of the strike. Our review persuades us that the Board's finding is supported by substantial evidence on the record considered as a whole. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

V.

The Company's petition for review will be denied, and the Board's order will be enforced.

VAN DUSEN, *Senior Circuit Judge*, dissenting:

I respectfully dissent from the majority opinion because my analysis indicates that it is contrary to *Gould, Inc. v. N.L.R.B.*, 612 F.2d 728 (3d Cir.), *cert. denied sub nom. Moran v. Gould Corp.*, 449 U.S. 890 (1980),[1]

1. Note 3 of the dissenting opinion of Member Penello makes clear that the Board, in promulgating its September 1980 decision, see *Metropolitan Edison Company, et al.*, 252 N.L.R.B. 1030, 1031 (1980), was referring to the December 1979 opinion of this court in *Gould*, as opposed to the opinion in that case as it was amended in March 1980, since *Gould, supra*. was cited at 252 N.L.R.B. 1031 *and* 103 LRRM 2207 as 612 F.2d 728 (3d Cir. 1979), rather than as a 1980 decision. On March 13, 1980, the court added this wording to the *Gould* opinion in place of the last two sentences on page 12 of the 1979 slip opinion:

> "We reaffirm this court's previous statement of the proper precept to be applied where there is a mixed motivation attending employer's action: 'Although there might exist a justifiable cause for discharge of an employee, there is a violation of the Act if the real motive for the discharge is found to be the employer's dislike of union activity or affiliation. . . . Such real motive will be found where union activity by the employee is recognized as a substantial or motivating cause of his discharge.' *N.L.R.B. v. Gentithes*. 463 F.2d 557, 560 (3rd Cir. 1972) (per Chief Judge Seitz). It is also controlling case law of this court that where there is substantial evidence that the employee's discharge was motivated by the employee's protected activity, there is a violation of the Act notwithstanding the concurrent existence of an otherwise valid reason. *N.L.R.B. v. Princeton Inn Co.*, 424 F.2d 264, 265 (3d Cir. 1970). From our review of the entire record we conclude that there is no substantial evidence to support a finding that Moran's discharge was because he had filed charges with the EEOC, OSHA, and the Board. Accordingly the Board's holding of a §8(a)(4) violation must be vacated."

612 F.2d at 734. The report in 103 LRRM 2207 does not contain this new language, but it contains the previous language from the 1979 slip opinion. See 103 LRRM at 2211 (last two sentences).

More importantly, the majority of the Board cited and relied on *Precision Castings Company*. 233 N.L.R.B. 35 (1977), a decision which this court implicitly rejected in *Gould* when it adopted the reasoning of *Ind. & Mich. Elec. Co. v. N.L.R.B.*, 599 F.2d 227 (7th Cir. 1979), in the passage quoted on typescript pp. 4 & 5 of this dis-

which is this court's most pertinent decision on the facts presented by this record, and hence in violation of Chapter VIII, paragraph C (p. 25), of the Internal Operating Procedures (IOP) of this court.[2] I would vacate the Board's order and remand the case to the Board for reconsideration and application of the principles of *Gould*, *supra*, to the factual situation presented by this record.

In addition to the language quoted from the decision of the ALJ on page 4 of the majority typescript opinion, that decision contains this wording at p. 1034 of 252 N.L.R.B.:

> "Respondent contends that Lang and Light were given the greater discipline not because they held union office but rather:
>
> > . . . it was awarded because of things they did or did not do; statements they made or did not make; and, the misuse of the union office they held.
>
> "Respondent points out that, while violations of the no-strike agreement were not frequent at its plants, the August 30 incident was not the first. On prior occasions in 1970, 1972, 1973, and 1974, members of various IBEW locals engaged in work stoppages in violation of the contract. In each of those incidents the participating employees were disciplined and the union officers or stewards involved

---

NOTE 1 — *(Continued)*

sent. 612 F.2d at 732-33. The Board's brief in this appeal admits that it refused to follow our decision in *Gould* and instead applied its own case law. Respondent's brief at pp. 32-35.

2. Paragraph C of Chapter VIII of the IOP reads as follows:

> "It is the tradition of this court that reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court in banc consideration is required to overrule a published opinion of this court."

were given greater discipline for failure to make bona fide efforts to get the employees back to work. Indeed, in the 1973 work stoppage, which occurred at T.M.I., Lang and Light, as union officers, received the greater discipline. In 1972 and 1974, when the Union took to arbitration the question of the greater discipline assigned to the union officers, the Company's discipline was upheld. In both arbitration decisions, the arbitrators held that union officials had an affirmative duty, by virtue of their office, to honor and protect the collective-bargaining agreement, and that failure to exercise that responsibility subjected them to more severe penalties. Respondent also pointed out that both Lang and Light had been told repeatedly, both prior to the August 30 incident and while it was occurring that Respondent expected them to set an example for the other employees by crossing the picket line and that it would discipline them if they failed to do so. Further, Respondent argued, by attempting to secure the removal of the picket line as a means of getting the employees back to work, rather than leading the employees across the picket line or ordering those employees to cross, Lang and Light 'became the active leaders of the strike.' This, Respondent stated, was a factor considered significant in determining the degree of their discipline.

"Respondent also adduced evidence that a work stoppage similar to that of August 30 had taken place on August 4. At that time, various participating employees, not including Lang and Light, were disciplined. Lang and Light were both told, quite emphatically, that the Employer considered it their obligation to cross a picket line and set a proper example for their members. At a union meeting following this work stoppage, Lang told his membership of their legal obligations. The membership

vociferously rejected his urgings that they cross such picket lines.

"Finally, Respondent points to an incident involving David Lang which it contends provides separate justification for the greater discipline accorded him. Early on the morning of August 30, after Lang had been summoned to the line by Hahn, an employee drove up, observed the pickets, and asked what he should do. According to Hahn, Hahn said 'come to work,' but *Lang told the employee, 'go to the union hall.'* According to Lang, when the employee (identified by Lang as Tom Lynch) asked what he should do, *Lang told him 'you know what you are supposed to do.' The employee never left his vehicle but drove off in the direction of the union hall. Lang saw Lynch later at the union hall.*"

(Emphasis supplied; footnotes omitted.)

The majority has chosen to follow language in two separate opinions of two individual judges on the panel in *Hammermill Paper Co. v. N.L.R.B.*, __ F.2d __ (3d Cir. No. 80-2499, Aug. 26, 1981), a case where each of the two members of the panel concurring in the judgment of the court stated his own views separately, rather than the very clear and strong language used by a unanimous panel of this court in *Gould, supra*, the facts of which are closer to those in this case than are the facts of *Hammermill*. In *Gould*, this court used the following language at pp. 732-33:

"We first consider the law applicable to the §§8(a)(1) and (3) violations and begin by noting our prior holding that 'strikes carried out in violation of a no-strike provision in a collective bargaining agreement are not protected by the Act, and therefore the discharge of employees who engage in such strikes is not an unfair labor practice.' *Food Fair Stores, Inc. v. NLRB*, 491 F.2d 388, 395 (3d Cir. 1974). Also relevant are Board rulings that an employer

need not fire all illegal strikers, but may 'pick and choose' which participants will be discharged as long as the basis for so doing is not union related. *Precision Castings, supra; Chrysler Corp.*, 232 NLRB 466, 474 (1977); *McLean Trucking Co.*, 175 NLRB 440, 450-51 (1969). See also *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S. Ct. 490, 83 L.Ed. 627 (1939). And we note, finally, the holding of the Supreme Court in *NLRB v. Great Dane Trailers, Inc.* 388 U.S. 16, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), that if the discriminatory discipline complained of is so inherently destructive of employee rights there is no need to establish any specific anti-union motivation in order to sustain a §8(a)(3) violation.

". . . when the Board followed *Precision Castings* with a similar ruling in *Ind. & Mich. Elec. Co.*, 237 NLRB No. 35 (1978), that ruling was reversed on appeal, *Ind. & Mich. Elec. Co. v. N.L.R.B.*, 599 F.2d 227 (7th Cir. 1979). The Board had ruled that the greater responsibility which accompanies the holding of union office was insufficient reason for imposing more severe discipline on officers than rank-and-file strikers. In reversing, the court reasoned:

> Employees have no right to participate in an illegal strike. Accordingly, if an employee right is threatened here, it must be one relating to union office. The Board has said and we recognize that union office 'embodies the essence of protected concerted activities.' See *General Motors Corp.*, 218 N.L.R.B. 472, 477 (1975), *enforced*, 535 F.2d 1246 (3d Cir. 1976). Employer action that would impair some right or restrict some legitimate activity of union officials and thereby discourage members from holding office would no doubt have an inherently adverse

affect on employee rights. The same is not true, however, of employer action that at most deters union officials from deliberately engaging in clearly unlawful conduct that is both a violation of their duties as employees and union members and a repudiation of their responsibilities as union officials.

In arguing that status as a union official may not be the sole criterion for differentiating among employees in meting out discipline, the Board somewhat misstates the issue. The more severe punishment was not based merely on the officials status but upon their breach of the higher responsibility that accompanies that status, a breach that makes their misconduct more serious than that of the rank-and-file. 599 F.2d 230.

* * *

Differentiating between union officers and rank-and-file in meting out discipline for participating in a clearly illegal strike (footnote omitted) did not penalize or deter the exercise of any protected employee right. We believe the employer was entitled to take into account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonably considered inherently destructive of important employee rights. 599 F.2d 232.

"We concur in that reasoning and believe that it applies as well to the instant case and supports our conclusion that the Board's finding of a §8(a)(1) and (3) violation must be vacated. More specifically, we cannot agree with the Board's deduction that since Moran was a steward and was discharged it follows logically that he 'was singled out for discipline *solely because* he was the steward.' On the

contrary, it is clear that he was disciplined because he participated in an illegal strike and failed to perform his contractual obligation to take positive steps to halt that work stoppage. True, this duty devolved upon him because he fell within the *class* of persons upon whom the collective bargaining agreement imposed that duty, to wit, officers of the union, but the agreement could just as well have imposed this duty on individuals by name regardless of their office, and the result would be the same. In other words, it was a breach of a duty *imposed* by his office and not his office *as such* which formed the basis for his discharge. Viewed in this light, Moran's discharge was permissible and did not constitute an unfair labor practice. Indeed, if we were to hold otherwise, the union officer who participated in an illegal work stoppage would be placed in a more advantageous position than the rank-and-file members and this would be neither fair, logical nor just.

"The General Counsel's agrument that since the company lacked the right under the contract to discharge Moran for violating Article XVI §3 his discharge was unlawful is unpersuasive. It is true that §3 contains no provision for the discipline of those who violate it, however, §2 does give the company the right to discharge those who participate in illegal work stoppages. Section 3 of Article XVI was relied upon merely as a basis for singling out Moran from among the strikers subject to discharge. This was lawful.

". . . As for the contention that as a result of this ruling prospective stewards will be dissuaded from seeking union office, an obvious and short answer is that they should be deterred from seeking office if they intend thereafter to participate in illegal work stoppages or to repudiate contractual obligations which were freely negotiated and volun-

tarily assumed. The company's action and our ruling deters no other kind of 'union' activity."

(Emphasis in original)

Also, in *Hammermill, supra*, Judge Rosenn, writing the OPINION OF THE COURT, pointed out that

> ". . . the result we reach is not at all inconsistent with *Gould* and *Indiana*. Nor do we see any need to reconsider our decision in *Gould* . . . . [W]e caution the Board that insofar as *Gould* holds that an employer may use discipline as a means of enforcing the individual duties of union officials, we continued to adhere to that precedent."

It is noted that *Indiana*, cited above, is referred to in that portion of the *Gould* opinion quoted above.

There is no showing that the company ever approved, condoned, or ratified the personal decision of the two union officials to negotiate with the pickets, thereby prolonging the work stoppage, instead of leading their fellow union members across the picket line to work for this electric utility supplying power to the Harrisburg area of southeastern Pennsylvania.[3]

I believe the terms of VIII-C quoted above in note 2 require that this case, at the least, be remanded to the Board, which may decide to have it reconsidered by the

3. I note that this court had pointed out in *Eazor Exp., Inc. v. International Bro. of Team., Etc.*, 520 F.2d 951, 964 n.6 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976), *overruled on other grounds sub. nom. Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212 (1979):

> "That . . . discipline has been successfully used by a Teamsters local and that its use might well have been successful here is indicated by the case of an unauthorized strike by members of Local 241 of the Teamsters International Union against Eazor at Sharon, Pennsylvania in April 1968 where the strike was ended when a steward who refused to cross the illegal picket line was removed by the officers of the local union and another put in his place who led most of the strikers back to work across the picket line."

ALJ, who heard the witnesses, in light of *Gould*, as amended, and *Hammermill*, neither of which decision [sic] in its final form was considered by the ALJ (see note 1 above).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

252 NLRB No. 147

FJP
D—7064
Reading, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

METROPOLITAN EDISON COMPANY
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 563, AFL—CIO

Case 4–CA–9144

DECISION AND ORDER

On December 11, 1978, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge[1] and to adopt his recommended Order, as modified herein.[2]

1. We agree totally with the Administrative Law Judge's well-reasoned analysis, and we continue to adhere to the sound principles of *Precision Castings Company*, 233 NLRB [No.] 35 (1977). It suffices to say that our dissenting colleague, by allowing Respondent to discriminate against union officers who fail to perform their duties according to Respondent's standards, would create an anomaly which would have the effect of discouraging employees from being active in their union. Thus our colleague's position is at odds with the intent and meaning of Sec. 8(a)(3) of the Act.

2. We agree with the Administrative Law Judge that Respondent discriminated against Union Stewards Gene Light and David

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Metropolitan Edison Company, Reading, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following as paragraph 2(b):

"(b) Revoke the records of discriminatory disciplinary action given to Gene R. Light and David C. Lang, dated September 9, 1977, and remove same from their personnel files."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. September 30, 1980

John H. Fanning, *Chairman*

Howard Jenkins, Jr., *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

Lang by disciplining them more severely than rank-and-file employees for breaching the no-strike clause in the contract. Accordingly, we shall order Respondent to revoke its discipline of Light and Lang and records thereof only to the extent that it was discriminatory, that is, exceeded the discipline meted out to the other employees.

Member Jenkins approves the remedy, but in addition he would make the unlawfully disciplined union officials whole for the entire extent of the discipline imposed, not for just the amount by which their loss exceeded that of rank-and-file employees.

MEMBER PENELLO, dissenting:

Unlike my colleagues, I would reverse the Administrative Law Judge and dismiss the complaint in this case. I would find that Respondent did not violate Section 8(a)(3) and (1) of the Act by disciplining Union Officials Lang and Light more severely than other employees who participated in an unprotected sympathy strike, since they had a duty as union officers to enforce the contractual no-strike provision.

The facts in this case may be stated briefly. In 1977, Respondent and the Union were parties to a collective-bargaining agreement containing a no-strike clause. Employees Lang and Light were president and vice president, respectively, of the Union. Respondent's employees represented by the Union had engaged in numerous strikes in violation of the no-strike clause under the current and previous contracts, for which they had been disciplined. After an unlawful sympathy strike on August 4, 1977, Respondent informed Lang and Light several times that it was their duty as union officers to set an example for the members by crossing such a picket line in the future.

On August 30, 1977, another union set up a picket line at Respondent's facility because of a dispute with a contractor, and Respondent's employees represented by the Union refused to cross the picket line. Lang and Light did not cross the picket line, but rather spent the morning attempting to get the other union to remove the pickets so that their members would go back to work. On several occasions that morning, Respondent's officials requested Lang and Light to set an example for the employees by crossing the picket line and returning to work rather than continuing their efforts to remove the picket; however, both Lang and Light refused to do so. As a result of Lang's discussions with Respondent and the other union, Respondent established a reserved gate for employees of the contractor, the pickets were removed, and Respondent's employees returned to work.

Thereafter, Respondent gave all rank-and-file employees who refused to cross the picket line either 5- or 10-day suspensions, depending on whether they had previously participated in an unlawful work stoppage; however, Lang and Light each received 25-day suspensions for their failure to make every effort, including returning to work themselves, to uphold the contract and end the unlawful strike. The parties have stipulated that the work stoppage on August 30, 1977, violated the no-strike clause of the contract.

Once again I must reiterate my disagreement with the majority's conclusion that it is in violation of the Act for an employer to discipline a union official more severely than other employees for participating in a strike which violates a contractual no-strike provision. As I emphasized in my disssenting opinion in *Gould*[3] and in my concurring opinion in *Midwest Precision Castings*,[4] my view is that a union official who acquires a battery of "benefits and protections" because of his position with the union must also be held accountable to fulfill certain "duties and responsibilities" inherent in that position of authority and that foremost among those "duties and responsibilities" is the enforcement of a no-strike clause in a collective-bargaining agreement. Thus, I concluded that an employer could lawfully hold a union official to a higher standard of conduct than other employees because of the official's responsibilities under the contract.[5] I would continue to find that where a union official participates in an unprotected strike he can logically be viewed as the "natural leader" of the strike and that therefore an employer can lawfully discipline a union official more harshly than other employees for such par-

[3] *Gould Corporation*, 237 NLRB 881 (1978), enforcement denied 612 F.2d 728 (3d Cir. 1979).

[4] *Midwest Precision Casting Company*, 244 NLRB No. 63 (1979).

[5] See also *Indiana & Michigan Electric Company* v. *N.L.R.B.*, 599 F.2d 227 (7th Cir. 1979), denying enforcement of 237 NLRB 226 (1978).

ticipation, since the official has failed to fulfill his duty to enforce the contract.

In this case, it is undisputed that Lang and Light refused to cross the picket line and report to work, despite numerous requests by Respondent that they do so. I would conclude that by this conduct they joined and participated in the strike.[6] Since the work stoppage here admittedly violated the no-strike clause of the contract, I would find that Lang and Light breached their duty to enforce the contract by participating in such an unlawful strike.

However, a further question arises because, although Lang and Light clearly participated in the strike, they also made good-faith efforts to remove the picket line which was the cause of the work stoppage. While these efforts might appear to fulfill their responsibility to take affirmative action to bring the unlawful strike to an end, their efforts to remove the picket line were inconsistent with their refusal to abide by the contract themselves and cross the picket line to go to work. Thus, their actions clearly suggested to the employees that as long as the pickets remained employees had the right to refuse to cross the picket line, especially since they made no attempt to remind employees that the strike violated the contract or to urge other employees to cross the picket line and return to work. I would find that, in light of this inconsistency, their actions effectively demonstrated tacit approval of the employees' refusal to cross the picket line and undermined the Union's contractual no-strike commitment.

Furthermore, I note that in cases like this union officials typically have two different duties under the contract. The first is a negative duty, which is usually explicitly stated in the contract but is implicit in any no-strike clause, that the union will refrain from breaching its no-strike agreement. Mere participation by a union

[6] *Super Valu Xenia, A Division of Super Valu Stores, Inc.*, 228 NLRB 1254, 1259 (1977).

official in a strike in violation of a no-strike clause would breach this negative duty. The second duty is an affirmative duty that the union, through its officials, will take affirmative action to bring any strike in violation of the no-strike clause to an end. This affirmative duty may be explicity stated in the contract, as it was in *Gould*, or may merely be implicit in the no-strike provision of the contract, as is the case here. As this case illustrates, it is possible for a union official to comply with one duty without necessarily fulfulling his obligations under the other duty. Logically, the negative duty should take precedence. Thus, I would find that, regardless of what other actions are taken by a union official, he has responsibility to refrain from participating in a strike in violation of the no-strike clause. Of course, even if a union official does not participate in the unlawful strike, he may still fail to fulfill his responsibilities if he does not take steps to end the strike, in cases where the contract imposes such a duty either explicitly or implicitly. However, I would find that, at the very least, any no-strike agreement imposes upon union officials a negative duty to refrain from participating in an unlawful strike.

Inasmuch as Lang and Light participated in a strike in violation of the no-strike clause of the contract and thus clearly failed to comply with their responsibility as union officers to enforce the contract, I would find that Respondent acted lawfully in disciplining them more severely than other employees who participated in the illegal strike. Accordingly, I dissent.

Dated, Washington, D.C. September 30, 1980

John A. Penello, *Member*

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT give more severe discipline to employees who are unions officers than we give to other employees because the former employees hold union office.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist International Brotherhood of Electrical Workers, Local Union No. 563, AFL—CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activity.

WE WILL make Gene R. Light and David C. Lang whole for any loss of pay they suffered by reason of our discrimination against them, with interest.

WE WILL revoke the records of discriminatory disciplinary action given to Gene R. Light and David

C. Lang, dated September 9, 1977, and we will remove same from their personnel files.

METROPOLITAN EDISON COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William J. Green Jr. Federal Building, 600 Arch Street, Room 4400, Philadelphia, Pennsylvania 19106, Telephone 215-597-7643.

JD-814-78
Reading, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

METROPOLITAN EDISON COMPANY
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 563, AFL-CIO

Case No. 4-CA-9144

Robert T. Kofman, Esq., of Philadelphia, PA, for the General Counsel.
George A. Burnstein, Esq., of Philadelphia, PA, for the Respondent.

DECISION

Statement of the Case

MICHAEL O. MILLER, Administrative Law Judge: Upon a charge filed on January 9, 1978, by the International Brotherhood of Electrical Workers, Local Union No. 563, AFL-CIO (herein the Union), a complaint was issued by the Regional Director for Region 4 of the National Labor Relations Board on February 27, 1978, and a hearing was held before me in Harrisburg, Pennsylvania on July 17, 1978.

At issue was whether Metropolitan Edison Company (herein the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (herein the Act) when it disciplined union officers David C. Lang and Gene R. Light more severely than rank-and-file union members for their participation in an unlawful work stoppage.

All parties were given full opportunity to participate, to introduce relevant evidence, examine and to cross-ex-

amine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed by General Counsel and the Respondent.

Upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Respondent's Business and the Union's Labor Organization Status - Conclusions of Law

Respondent is a Pennsylvania corporation engaged in the generation, distribution and sale of electric power, serving the Southeast portion of the Commonwealth of Pennsylvania. Jurisdiction is not in issue. The complaint alleges, Respondent admits, and I find and conclude that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. *General Background - Collective—Bargaining History*

Respondent has approximately 2600 employees, approximately 1600 of whom are represented by 5 locals of the International Brotherhood of Electrical Workers, AFL-CIO. The five local unions bargain with the Respondent as a single unit and all of these employees are covered by a single collective-bargaining agreement.

The parties' collective-bargaining agreement in effect at the time of the events herein contained the following no-strike clause:

Article XI

No-Strikes - No Lockouts

11.1 The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public.

The locus of events involved herein is the Three-Mile Island nuclear generating plant (herein referred to as T.M.I.), located on an island in the Susquehanna River just south of Harrisburg, Pennsylvania. The plant is a two-unit nuclear generating station with one unit currently operating and a second under construction. Working on the island are approximately 516 of Respondent's employees, 300 of whom are members of the Union, covered by the collective-bargaining agreement. There are other persons working on T.M.I. as employees of contractors who are engaged in the construction of the second generating plant and in maintenance work. The contractors' employees are represented by various unions in the building trades.

Access to the island is achieved by two bridges. The north gate, or bridge, is a permanent entrance which is used primarily by Respondent's employees and employees of contractors performing maintenance work on the generating units. The south gate is a temporary bridge, used principally by contractors engaged in the construction work and their employees. The incident involved herein occurred at the north gate.

B. *The August 30, 1977 Work Stoppage and Resultant Discipline*

On the morning of August 30, 1977,[1] members of the Operating Engineers union set up a picket line at the north gate of T.M.I. protesting the refusal of a contractor to hire members of their union. Members of the Union, including its president, David C. Lang and its vice president, Gene R. Light, refused to cross the picket line and did not report for work until the picket line was removed at around 11 a.m., following the establishment of a reserved gate. It was stipulated that the refusal of the members of the Union to cross this picket line and report to work was a violation of the no-strike clause, set forth above.

In response to this violation of the no-strike clause, Respondent disciplined the employees involved. One hundred and thirty-five rank-and-file unit members received 5-day and 10-day suspensions. These employees also received written records of their disciplinary action which stated that the discipline was assigned for "failure to report for work as scheduled and participation in an unlawful work stoppage." Under remarks, the notice of discipline further stated: ". . . Any future similar action by you may result in severe disciplinary action, including discharge."

Union President Lang and Union Vice President Light each reveived 25-day suspensions. Their records of disciplinary action set forth the same reason for the discipline as those given to the other 135 employees but went on to state:

> In addition, you are being disciplined for your failure as an elected official of Local Union 563 IBEW to demonstrate to the Company, in an objective manner, your affirmative duty as an elected officer to:

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1. All dates hereinafter are 1977, unless otherwise specified.

(a) Make every effort to uphold the sanctity of the Agreement and its established grievance procedures.

(b) Make every bona fide effort to prevent the unlawful work stoppage.

(c) Make every effort, including returning to work yourself, to end the unlawful work stoppage.

Your participation in any unlawful work stoppage in the future will result in your immediate discharge.
(Emphasis in original).

Additionally, both Lang and Light were told by Henry L. Robidoux, Respondent's vice president of operations, that they were receiving this discipline because Respondent felt that as union officials they had an obligation to cross the picket line and set an example for the other employees to follow.

There is no dispute as to whether Lang and Light refused to cross the picket line. They did. Both of them spent the morning of August 30, 1977, seeking to secure removal of the picket line so that their members, who had earlier indicated an unwillingness to cross any picket line, would go to work. Thus, Lang had come to T.M.I. early on the morning of August 30, pursuant to a phone call from Gary Hahn, Respondent's personnel administrator, in which Hahn advised him that there was a picket line which the IBEW members were refusing to cross and requested him to see what could be done. In the course of their conversations that morning, Hahn reiterated to Lang a position taken by the Company a number of times previously that the union officers had a particular obligation to cross the picket line so that other employees would follow. When Lang arrived at the gate he spoke to the Operating Engineers' picket captain, learned the reason for the picket line, and was told that the line would not be removed unless removal was or-

dered by his business agent. Lang called the business agent. Subsequently, Lang went to the union hall, several miles away in Middletown, Pennsylvania, opened it up for the other employees, and directed Gene Light to go to the Operating Engineers to see whether he could negotiate with them to get them off the bridge. When he returned to the picket line, Lang was again told, by both Thomas Hambach, Respondent's director, Division Personnel, and by Walter Poyck, its coordinator of services, that he had a particular obligation as a union official to cross the picket line. Lang told Hambach that it was the consensus of the members that they were not going to cross until the picket line came down and he told Poyck that he felt it was better if he stayed out because then he could at least negotiate with the pickets. Gene Light had substantially similar conversations with both Poyck and Hambach.

In the course of discussing what it would take to have the picket line removed, the Operating Engineers' steward told Lang that they would remove the picket line if the contractors ceased using the north bridge. Lang related this to Poyck. Respondent subsequently set up a reserved gate for the contractors' employees at the south bridge and the picket line came down.

C. *The General Counsel's Theory and Respondent's Defense*

The General Counsel contends that the foregoing facts bring this case squarely within the principles enunciated by the Board in *Precision Castings Company*, 233 NLRB No. 35 (1977). In that case, union stewards who participated in a walkout in violation of their no-strike clause, who did nothing to prevent the strike or stop it once it began, and who joined the picket line established as part of that walkout, were suspended. Respondent admitted that the suspensions were assigned to these individuals because of their status as

shop stewards and because they supposedly failed to abide by their contractual responsibility as union officials, to take reasonable steps to terminate the work stoppage. The contract in *Precision Castings* specifically required the Union, in the event of any work stoppage, to notify employees that they were in violation of the agreement and to take all reasonable steps to restore normal operations. The Board held that the selection of employees for discipline on the basis of their positions as union officers was "discrimination directed against an employee on the basis of his or her holding union office . . . contrary to the plain meeting of Section 8(a)(3)" and "would frustrate the policies of the Act if allowed to stand." It rejected the employer's assertion therein that under the terms of the collective-bargaining agreement the union officers could be held to a higher degree of accountability for participating in the strike.

Respondent herein contends, at least impliedly, that *Precision Castings* was wrongly decided and further would factually distinguish this case from the case before the Board in *Precision Castings*.

Respondent contends that Lang and Light were given the greater discipline not because they held union office but rather:

> . . . it was awarded because of things they did or did not do; statements they made or did not make; and, the misuse of the union office they held.

Respondent points out that while violations of the no-strike agreement were not frequent at its plants, the August 30 incident was not the first. On prior occasions, in 1970, 1972, 1973, and 1974, members of various IBEW locals engaged in work stoppages in violation of the contract. In each of those incidents the participating employees were disciplined and the union officers or stewards involved were given greater discipline for failure to make bona fide efforts to get the employees back to work. Indeed, in the 1973 work stoppage, which

occurred at T.M.I., Lang and Light, as union officers, received the greater discipline. In 1972 and 1974, when the Union took to arbitration the question of the greater discipline assigned to the union officers, the Company's discipline was upheld.[2] In both arbitration decisions, the arbitrators held that union officials had an affirmative duty, by virtue of their office, to honor and protect the collective-bargaining agreement, and that failure to exercise that responsibility subjected them to more severe penalties. Respondent also pointed out that both Lang and Light had been told repeatedly, both prior to the August 30 incident and while it was occurring, that Respondent expected them to set an example for the other employees by crossing the picket line and that it would discipline them if they failed to do so. Further, Respondent argued, by attempting to secure the removal of the picket line as a means of getting the employees back to work, rather than leading the employees across the picket line or ordering those employees to cross, Lang and Light "became the active leaders of the strike." This, Respondent stated, was a factor considered significant in determining the degree of their discipline.[3]

Respondent also adduced evidence that a work stoppage similar to that of August 30 had taken place on August 4. At that time, various participating employees, not including Lang and Light, were disciplined. Lang and Light were both told, quite emphatically, that the employer considered it their obligation to cross a picket line and set a proper example for their members. At a union meeting following this work stoppage, Lang told

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2. The 1973 discipline assigned Lang and Light, which was in language identical to that used in the August 30 incident, was not taken to arbitration by the Union.

3. Respondent acknowledges at several points in its brief that Lang and Light were in fact working to secure the removal of the picket line on August 30, as a means of getting the employees back to work.

his membership of their legal obligations. The membership vociferously rejected his urgings that they cross such picket lines.

Finally, Respondent points to an incident involving David Lang which it contends provides separate justification for the greater discipline accorded him. Early on the morning of August 30, after Lang had been summoned to the line by Hahn, an employee drove up, observed the pickets and asked what he should do. According to Hahn, Hahn said "come to work," but Lang told the employee, "go to the union hall." According to Lang, when the employee (identified by Lang as Tom Lynch) asked what he should do, Lang told him "you know what you are supposed to do." The employee never left his vehicle but drove off in the direction of union hall. Lang saw Lynch later at the union hall.

D. *Analysis and Conclusions*

Contrary to the assertions of the Respondent, I find the instant case to be indistinguishable in any meaningful way from the relevant portions of *Precision Castings*, *supra*. In *Precision Castings*, the union violated its no-strike clause by striking in support of its own dispute with its employer. Here, the employees honored the picket line of another union which had a dispute with a second employer working on the site. This distinction would, if anything, make *Precision Castings* a stronger case for Respondent's position. See *Keller-Crescent Company*, 217 NLRB 685 (1975). Similarly making *Precision Castings* a stronger case for the Respondent's position was the fact that in *Precision Castings*, the contract specifically required the Union to take affirmative steps to end strikes in violation of the no-strike clause. No such provision existed in the contract between Respondent and the Union.

Respondent also argued that its history, since at least 1972, of disciplining union officers, including Lang and Light, more severely for their involvement in unlaw-

ful strike situations, the upholding of such discipline in two arbitrations, and the fact that Lang and Light ignored repeated admonitions to personally cross the picket line, distinguished this case from *Precision Castings*. I must reject these alleged distinctions as irrelevant. Respondent drew a distinction between those who had previously participated in unlawful work stoppages and those who had not when it disciplined the employees with different periods of suspension. However, in the cases of Lang and Light, it went further than it did with the rank-and-file employees and it did so, expressly, because of the alleged breach of their duties as union officers. Moreover, I find it to be totally immaterial that Lang and Light were told more than once what Respondent expected of them; their obligation to comply with the no-strike clause was formed when the contract was signed. It became no greater with repetition.[4] Additionally, I note, the notices of disciplinary action given to Lang and Light made no mention of their earlier participation in such work stoppages or of the repeated orders given them.

In this same vein, Respondent argued that the arbitration awards sustaining its greater discipline to union officers, and delineating a higher degree of obligation upon them, having "survived repeated renewals and modifications" of the collective-bargaining agreements, became "part of 'bargain' under which the Company and the Union conduct their day-to-day affairs . . ." Suffice it to point out that those arbitration awards predated *Precision Castings* and, if the Board were to consider such awards today in the context of a *Speilberg* analysis[5], it would likely find those awards repugnant to the pur-

4. It may be stating the obvious to point out that there was no question but that Lang and Light were obligated to honor the contract and its no-strike clause. There is no contention that their discipline, to the extent that it was the same as given other employees, was unlawful.

5. *Speilberg Manufacturing Company*, 112 NLRB 1080 (1955).

poses and policies of the Act. See *Dreis & Krump Manufacturing Company, Inc.*, 221 NLRB 309 (1975), enf'd. 544 F. 2d 320 (C.A. 7, 1976). Further, to the extent that Respondent may be arguing that the execution of contracts subsequent to those arbitration awards without some modification thereof acted as a waiver of the employees' statutory rights to be free from discrimination based upon their union membership or union offices, its argument must be rejected. Even assuming that this statutory right could be waived, "the Board and the courts have repeatedly emphasized that a waiver will not be lightly inferred and must be shown by 'clear and unmistakable language.' " *Keller-Crescent Company, a Division of Mosler*, 217 NLRB 685 (1975); *Gary-Hobart Water Corporation* v. *N.L.R.B.*, 511 F. 2d 284 (C.A. 7, 1975), enf'd 210 NLRB 742 (1974). No such "clear and unmistakable" waiver language is present in the agreement of these parties. Indeed, their contract specifically sets out what customs and practices exist in their relationship and makes no reference to such a waiver of statutory rights.

Respondent stated both in the disciplinary records and on brief that Lang and Light were disciplined for their failure as union officers to uphold the contract, to make efforts to prevent the work stoppage, and to secure the employees' return to work. Respondent contended that this was different than disciplining Lang and Light because they held union office, which, it argued, was the vice prohibited in *Precision Castings*. This was discipline rather for their failure to properly function as union officers. Respondent contended that as union officers they had failed in their obligation to make reasonable, good faith, or bona fide efforts to fulfill their contractual obligations. This is precisely the argument which the employer made in *Precision Castings*. Therein, the Respondent admitted that the employees were disciplined "because they supposedly failed to abide by their contractual responsibility as union officials, to take rea-

sonable steps to terminate the work stoppage." The Board rejected Respondent's argument and found that the discrimination was directed against the employees on the basis of their holding union office and was therefore violative of Section 8(a)(3) and (1) of the Act. Moreover, by determining for itself that the efforts[6] of Lane and Light in seeking to end the work stoppage were not "bona fide," "reasonable," or "in good faith," Respondent usurped a judicial function, determined for itself that there had been a breach of the collective-bargaining agreement and exacted its remedy for that alleged breach. It took its remedy not from the Union as an organization, as it would have been required to do had a court awarded monetary damages, but rather by punishing individuals who happened to hold union office. Further, Respondent's action intruded on the internal affairs of the Union when it arrogated the right to discipline for "misuse of union office." The possibility that an employee might suffer a penalty exacted out of his or her job tenure for what an employer perceives to be a "misuse of union office" would act as a powerful deterrent to an employee's willingness to assume a leadership role in a union.

Further, there is, in the assignment of greater discipline to union officers for the alleged breach of a collective-bargaining agreement, a basic inequality which is inconsistent with both the Union's right to act as collective-bargaining representative and the employees' right to participate in that representation. Unlike an employer who has the power to punish employees, a union has no power to punish management representatives. The Union can only seek to remedy what it believes to be breaches of the agreement through recourse to the grievance-arbitration machinery.[7] If the

6. Respondent acknowledged that both Lang and Light directed their efforts on August 30 to the removal of the picket line so that their members would report to work.

7. It is worth noting that the parties' contract herein, at Article X, provided a procedure, equivalent to the grievance procedure and

collective-bargaining process is to work, union representatives and officers must be deemed the equals of their management counterparts and must be as free from management imposed discipline for conduct engaged in their official union capacities as the management representatives are from union discipline for conduct engaged in their managerial capacities. As the Board has stated (in the context of grievance processing), the master-servant relationship does not carry over to dealings between the employer and the employee when the employees are acting as union representatives. At such times, there are only company representatives on the one side and union representatives on the other. See *Crown Central Petroleum Corp.*, 177 NLRB 322, 323, fn. 4 (1969). See also, *Hawaiian Hauling Service, Ltd.*, 219 NLRB 765 (1975). The situation here, I find, is essentially identical to those cases involving employer attempts to discipline employees for insubordinate statements made to management representatives while those employees are engaged in collective-bargaining of the presentation of grievances. As the Board stated long ago in the *Bettcher Manufacturing Corporation*, 76 NLRB 526, 527 (1948):

> If an employer were free to discharge an individual employee because he resented a statement made by that employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no parallel method of retaliation), or employees would hesitate ever to participate personally in negotiations. . . .

If employers are free to discipline union officers for what they perceive to be breaches of the collective-bargaining agreement or "misuse of union office" by the

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NOTE 7 — *(Continued)*
culminating in arbitration, for the adjustment of "company complaints." Respondent was not without a contractually established avenue of recourse.

individual acting in the capacity of a union officer, the same undesirable results would follow: "collective-bargaining would cease to be between equals (an employee having no parallel method of retaliation), or employees would hesitate ever . . ." to assume union office.

Also rejected is Respondent's assertion that Lang and Light became active leaders in the Operating Engineers' strike when they sought removal of the picket line and did not cross it. There is no evidence to support this assertion. Neither Lang nor Light made common cause with the pickets. They did not foment the strike or their members' honoring of the picket lines, they did not join the Operating Engineers on the picket line, and they did not seek to remedy the dispute with the primary employer. Cf. *J. P. Wetherby Construction Corp.*, 182 NLRB 690 (1970) wherein a steward was deemed lawfully discharged for having fomented a strike in violation of a no-strike clause and for his leadership role in that work stoppage.

The question remains as to whether David Lang's statement to employee Tom Lynch, either telling Lynch to go to the union hall or telling him he knew what he was supposed to do[8] warranted a higher degree of discipline for David Lang. I do not find that it does. Lang's statement to Lynch was not an affirmative act to foment or call the strike. Cf. *J. P. Wetherby Construction Corp.*, *supra*. Rather, it was a realistic reaction to a situation wherein all of the union members were refusing to cross the picket line, as they had previously indicated they would do, contrary to Lang's urgings and advice.

Accordingly, I find that Respondent's discipline of Gene Light and David Lang, to the extent that it exceeded the discipline given to rank-and-file employees who refused to cross the picket line on August 30, 1977, constituted discrimination based upon their holding of

8. In either case, Lang failed to tell the employee to go to work and either stated or implied that he was not to do so. Therefore I do not consider it necessary to resolve this minor credibility conflict.

union office and violated Section 8(a)(3) and (1) of the Act.

III. Further Conclusions of Law

1. By giving more severe discipline to Gene R. Light and David C. Lang than was given to other employees who participated in the August 30, 1977 violation of the contractual no-strike provision, because said Gene R. Light and David C. Lang were officers in the International Brotherhood of Electrical Workers Local Union No. 563, AFL-CIO, Respondent has violated Section 8(a)(3) and (1) of the Act.

2. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

IV. The Remedy

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, it will be recommended that Respondent be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily assigned greater discipline to Gene R. Light and David C. Lang by suspending them for longer periods of time than other employees who participated in the work stoppage of August 30, 1977, Respondent shall be required to make them whole for any loss of pay they suffered by reason of this discrimination. Any backpay found to be due shall be computed, with interest, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB No. 117 (1977).[9]

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9. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the basis of the entire record, the findings of fact, and the conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issued the following recommended:[10]

ORDER

The Respondent, Metropolitan Edison Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discriminating against its employees by giving more severe discipline to union officers than to other employees because of their positions as union officers.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist the International Brotherhood of Electrical Workers, Local Union No. 563, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

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10. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Make Gene R. Light and David C. Lang whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Revoke the Records of Disciplinary Action given to Gene R. Light and David C. Lang, dated September 9, 1977, and remove same from their personnel files.

(c) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other documents necessary and relevant to analyze and compute the amount of backpay due under this Order.

(d) Post at its Three Mile Island facility copies of the attached notice marked "Appendix."[11] Copies of said notice on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

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11. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. December 11, 1978

/s/ MICHAEL O. MILLER

Michael O. Miller
Administrative Law Judge

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE LAW AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT give more severe discipline to employees who are union officers than we give to other employees because the former employees hold union office.

WE WILL make GENE R. LIGHT and DAVID C. LANG whole for any loss of pay they suffered by reason of our discrimination against them, with interest.

WE WILL revoke the Records of Disciplinary Action given to GENE R. LIGHT and DAVID C. LANG, dated September 9, 1977, and we will remove same from their personnel files.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 563, AFL-CIO or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective-bargaining or other

mutual aid or protection, or to refrain from any and all such activity.

METROPOLITAN EDISON COMPANY
(Employer)

Dated_____ By _____
(Representative) *(Title)*

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William J. Green Jr. Federal Building, 600 Arch Street, Room 4400, Philadelphia, Pennsylvania 19106, Telephone No. (215) 597-7643.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

METROPOLITAN EDISON COMPANY, *Petitioner,*	)	
v.	)	No. 80-2588
NATIONAL LABOR RELATIONS BOARD, *Respondent.*	)	

JUDGMENT

Before: SEITZ, Chief Judge, VAN DUSEN and HIGGINBOTHAM, Circuit Judges

THIS CAUSE came on to be heard upon a petition filed by Metropolitan Edison Company, Reading, Pennsylvania, to review an order of the National Labor Relations Board issued against said petitioner, its officers, agents, successors, and assigns, on September 30, 1980, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on July 14, 1981, and has considered the briefs and transcript of record filed in this cause. On November 13, 1981, the Court, being fully advised in the premises issued its opinion denying petition for review and enforcing the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Petitioner, Metropolitan Edison Company, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

BY THE COURT

/s/ SEITZ

Chief Circuit Judge

DATED: December 9, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 80-2588

METROPOLITAN EDISON COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

LOCAL UNION 563, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Intervenor

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges*

The petition for rehearing filed by Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ
Chief Judge

Dated: January 5, 1982

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*Judges Adams, Hunter, Weis and Garth would grant the petition for rehearing en banc.

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 563	)	Case Number: 14 30 0982 72 H
and	)	
METROPOLITAN EDISON COMPANY	)	

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated May 15, 1970 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

The three-day disciplinary suspensions assessed against the grievants, Mr. William P. Rush, Jr., Mr. Stewart Willever, Jr., and Mr. William W. Rounsaville were for proper cause. The grievances are dismissed.

/s/ WAYNE E. HOWARD

Arbitrator's signature (dated)
Wayne E. Howard, Arbitrator
Dated: May 30, 1973

STATE OF
COUNTY OF } ss.:

On this day of , 19 , before me personally came and appeared
to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

AMERICAN ARBITRATION ASSOCIATION,
ADMINISTRATOR
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration	)	
between	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 603	)	Opinion of Arbitrator
	)	Case Number: 14 30 0982 72 H
and	)	
METROPOLITAN EDISON COMPANY	)	

Pursuant to Article IX of the Agreement dated May 15, 1970 between the Metropolitan Edison Company (hereinafter referred to as the Company) and the International Brotherhood of Electrical Workers, Local Unions Nos. 563, 603, 803, 1261, and 1482 (hereinafter referred to as the Union), a hearing was held before the undersigned arbitrator at the Hotel Easton in Easton, Pennsylvania on March 16, 1973. At the hearing, the parties appeared, gave testimony, presented evidence, and were represented by Carl F. Skinner, Esq. for the Union and Joseph Bell, Esq. for the Company. The parties agreed to waive the Board of Arbitration and have the matter determined by the undersigned arbitrator. Both parties submitted post-hearing briefs.

BACKGROUND OF THE CASE

On the morning of April 20, 1972 some 100-150 employees scheduled to report for work congregated outside on the Company's parking lot and refused to report for work. Union President Rush, Union Vice-President Willever, and Shop Steward Rounsaville met with Construction Superintendent Steckel and Operating Superintendent Brudereck and told the latter that the employees would not return to work until certain employees suspended the previous day were returned to work with

back pay. Mr. Brudereck indicated that the employees would not be reinstated and it was up to the Union to see that the employees started work at their regular starting time, with the question of the suspended employees to be resolved through the grievance procedure.

Sometime between 9:00 and 9:30 A.M. the same three Union officials again met with the Company and requested that the suspended employees be returned to work by noon and the issue of the suspended employees be resolved through the grievance procedure. Mr. Brudereck informed the Union officials that the suspended employees would not be reinstated by noon and that there would be no discussions until the employees returned to work. During the course of this conversation, Mr. Rush allegedly admitted he had talked by phone to International Union officials and they had indicated the Company was correct in refusing to discuss any grievances until all the employees had returned to work.

Shortly before 10 A.M. Union President Rush in the company of Mr. Willever and Mr. Rounsaville met with the Company and asked Superintendent Brudereck to speak to the employees. Union President Rush spoke to the employees, pointed out that the Company was correct in not discussing the situation until they returned to work, and asked them to return to work. Allegedly, Mr. Brudereck then spoke telling the employees if they did not report for work by 10:15 A.M. they would be sent home. The employees then reported to work.

The Company assessed written warnings against employees engaged in the work stoppage which warnings were grieved and carried to arbitration. Arbitrator Stanley Alderfer found the work stoppage to be in violation of the Agreement, and upheld the Company in its assessment of written warnings.[1] Employees Rush, Willever, and Rounsaville were assessed five-day disciplinary suspensions, later reduced to three-day disciplin-

1. AAA Case No. 14 30 0983 72 H dated February 13, 1973.

ary suspensions, for "participation and activities connected with the unauthorized work stoppage" as Union leaders. These latter suspensions were grieved, and unable to adjust the grievance to its satisfaction, the Union requested arbitration of the issue.

POSITIONS OF THE PARTIES

The Company's Position

The Union officers who were disciplined made no real efforts to get the employees back to work until after they called the International Vice-President of the Union and were specifically told to do so. Prior to that time, employees were not called together nor was any concerted effort made to reach the majority of them who were desultorily walking about or sitting in their cars because of the inclement weather. The Union officers constantly returned to Company representatives and requested that the discipline of the suspended employees be lifted. Repeated efforts were directed at persuading the Company to change its position on the discipline, as opposed to good faith efforts to get the employees back to work. (Company Brief, p. 1)

The written memorandum from which Union witness Rounsaville testified supports the Company's version of the incident. It should be noted that this memorandum written contemporaneously with the events in question makes no mention of Union efforts to get the men to return to work until approximately 10 A.M. when the illegal stoppage had already continued for several hours. Moreover, the document refers to the fact that "the Company made no effort to get the people to return." It is incredible that the document would refer to the final efforts of the Union, would note the fact that the Company made no efforts, and yet fail to record any other efforts made by Union officers. In addition, the document supports the fact that even after the Union called the International, the Union was still attempting

to adjust the matter of the suspended employees rather than making real efforts to get the employees to return. (Company Brief, pp. 2-3)

The Company version of the incident is further supported by the findings of Arbitrator Alderfer, to wit:

> He (Rush) admits he did not tell the men they should go to work and file a grievance later.
>
> * * *
>
> The president of the Union was in error, as he admitted, when he failed initially to instruct the striking employees to report to work and file a grievance later. (Company Exhibit 1, p. 9)

This finding was based on testimony in a case between the same parties and the same witnesses. (Company Brief, p. 3)

Ultimately Union representatives did call the employees together and endeavor to have them return to work, and in the end they succeeded. These facts were given consideration in the modest amount of discipline assessed. The Union representatives, however, did not make a substantial effort until several hours after the stoppage took place. (Company Brief, pp. 3-4)

For the above reasons, the disciplinary suspensions were proper and the grievances should be dismissed.

The Union's Position

The uncontradicted evidence is that the grievants contacted as many employees as possible, individually or collectively and informed them that their actions were not legal and they should report to work. The uncontradicted evidence further makes clear that the grievants sought the help of an International Representative of the Union who was not available and another who stated that he had no authority to come to the work location in order to assist in getting the employees back to work. (Union Brief, p. 2)

Company witnesses admitted that they did not see or hear the grievants encourage the work stoppage, but rather they sought the assistance of the Company in getting the employees back to work. It is clear that the Company refused any assistance until approximately 10 A.M., some two hours after the problem arose. It was only the result of the continued pleading of the grievants that Mr. Brudereck consented to talk to the employees who had not reported to work. (Union Brief, p. 3)

At 10 A.M. Union President Rush assembled the employees in a bay area and again made a plea to the employees to report to their work locations, and as he had been doing all morning, stated it was the only legal way for the problems to be resolved. Finally, at this time the employees reported to work. (Union Brief, p. 3)

The Company takes the position that each of the grievants should be suspended "for failing to take positive action to end the work stoppage and not exercising the leadership expected" of them in their respective Union positions. Nothing could be further from the truth. All of the uncontradicted evidence indicates that each of the grievants spent the entire morning of April 20, 1972 exercising all of their energies, efforts, and powers of persuasion to have the employees report to work and settle any problems through contractual procedures. They exercised the leadership expected of them and did not fail to take positive action to end the work stoppage. (Union Brief, p. 4)

Apparently, it is the Company's position that because they failed in all of their efforts, they were derelict in their duties and therby violated the Agreement. The mere fact that an individual does his very best to complete a task, but fails to do so through no fault of his own cannot be construed as improper conduct which should lead to the sort of disciplinary action taken by the Company. Had the grievants completely ignored the situation, a different conclusion might be reasonable, but all of the uncontradicted facts show that the contrary was

true, and there was no basis for the disciplinary action taken by the Company. (Union Brief, pp. 4-5)

For the above reasons, the Company should be directed to remove the suspensions of the grievants and to make them whole for all lost wages.

OPINION

The issue in the instant case is whether the three-day disciplinary suspensions assessed against the grievants, Mr. William P. Rush, Jr., Mr. William W. Rounsaville, and Mr. Stewart Willever, Jr. were for proper cause. The Company basically contends that the grievants did not make a *bona fide* and substantial effort to get the employees back to work until several hours after the unauthorized work stoppage took place. The Union basically argues that the grievants made repeated efforts to get the employees back to work, and while their efforts were without avail for the first several hours, they did finally manage to persuade the employees to go back to work.

Certain aspects of the instant matter are *res judicata*. Arbitrator Alderfer found that the work stoppage in question in violation of Article XI and Article IX of the Agreement. He also found that the discipline assessed against the other employees for just cause. The question before the instant arbitrator is whether the more serious discipline assessed against the grievants by reason of their Union position was proper.

Cutting through the conflict in the testimony, it is clear that all three grievants *participated* in the illegal work stoppage. It is equally clear that on at least two occasions while the illegal work stoppage continued, the three grievants *attempted to get the Company to change its position* on its previous suspension rather than follow the Agreement-established grievance procedure. Not until President Rush had contacted the International Union, and not until the illegal work stoppage had con-

tinued for approximately two hours, did President Rush *demonstrate to the Company in an objective manner* his good faith efforts to get the employees to return to work.

Participation in an unauthorized strike or work stoppage is one of the most serious offenses with which an employee can be charged. The offense strikes with equal force against the Union as well as the Company. It usurps the authority of the Union leadership, denies the value of collective bargaining, negates the existence of the collectively-bargained grievance procedure, and places the job security of fellow employees in jeopardy.

Because of the seriousness of the offense, the obvious economic problems in punishing all who participate, and the great difficulty in securing accurate information as to the extent of employee involvement, it is well-established in arbitration that the Company may assess selective discipline upon those who have a greater degree of involvement,[2] or upon those against whom it can get reliable evidence, notwithstanding the participation of others who escaped discovery.[3] It is equally well-established that because of the seriousness of the offense and the difficulty of securing reliable information, arbitrators have allowed management to develop rather broad criteria for selective discipline, provided there is some distinguishing characteristic between those who were disciplined, or disciplined more harshly, and those who received no discipline, or a less serious disciplinary penalty.[4]

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2. *Armour Creameries*, 31 LA 291; *Vickers, Inc.*, 33 LA 594; *Pittsburgh Steel Co.*, 34 LA 598; *Pullman-Standard*, 47 LA 52; *Ford Motor Co.*, 41 LA 609; *Fruehauf Trailer Co.*, 42 LA 478; *Kaye-Tex Mfg. Co.*, 36 LA 666.

3. *Hooker Chemical Corp.*, 36 LA 857; *Union Tank Car Co.*, 49 LA 383; *United States Steel Corp.*, 50 LA 472; *Ford Motor Co.*, 41 LA 609.

4. *Kaye-Tex Mfg. Co.*, 36 LA 666; *Ford Motor Co.*, 41 LA 609; *Phillips Industries, Inc.*, 45 LA 943; *Fruehauf Trailer Co.*, 42 LA 474; *Ingersoll Products Div.*, 49 LA 882.

The three grievants stood in a position different from the other employees. Mr. Rush and Mr. Willever were local Union President and Vice-President of the Union, respectively. Mr. Rounsaville, while only one of some ten Shop Stewards, by accompanying Mr. Rush and Mr. Willever on their discussions with the Company, assumed a Union leadership role not demonstrated by the other Shop Stewards. It is well-established that Union officials have an *affirmative duty* to protect the authority of the Union leadership from illegitimate action on the part of employees, and to uphold the sanctity of the Agreement and its established grievance procedures. Failure to exercise this responsibility subjects them to more serious penalties.[5]

Taking the testimony of the grievants at full face value still leaves considerable doubt that they exerted every effort to halt the stoppage at the outset. More importantly, however, is the fact that they *failed to demonstrate to the Company during the course of the stoppage* that they were making such an effort. Indeed, they attempted during the course of the illegal stoppage to bargain concessions from the Company. Such action is inconsistent with a *bona fide* effort to end the stoppage, and, in fact, seeks to profit from an action which on its face was in violation of the Agreement. Contrary to Union contentions, the Company was under no obligation to render assistance to the Union in returning the employees to work. Indeed, the mere *participation* by Union leaders in an illegal work stoppage is sufficient to justify a differential penalty, particularly where, as here, the differential penalty, a three-day disciplinary layoff, was of relatively little magnitude.

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5. *International Harvester Co.*, 14 LA 986; *Ford Motor Co.*, 41 LA 609; *Vickers Inc.*, 33 LA 594; *Borden Chemical Co.*, 34 LA 325; *Deere and Co.*, 43 LA 182; *Phillips Industries, Inc.*, 45 LA 953; *Acme Boot Co.*, 52 LA 1047; *Elgin Sweeper Co.*, 50 LA 1029; *American Hoist and Derrick Co.*, 53 LA 46.

For all of the above reasons, the three-day disciplinary suspensions assessed against the grievants, Mr. William P. Rush, Jr., Mr. Stewart Willever, Jr., and Mr. William W. Rounsaville were for proper cause and the grievances are dismissed.

/s/ WAYNE E. HOWARD

Wayne E. Howard
Arbitrator

In the Matter of Arbitration :

Between :

International Brotherhood of Electrical Workers, Local 603 :

and Award and Opinion

Metropolitan Edison Company

. . . . . File

AAA Case No. 14 30 0712 75 H

Grievance No. 69 94 E

Arbitrator: Jacob Seidenberg, Esquire

Hearing: September 25, 1975

Appearances:

Union

Carl F. Skinner, Esquire—Counsel

Company

Joseph Bell, Esquire—Counsel

Post Hearing Briefs Filed: December 1, 1975

Issue: Did the Company have just cause to discipline the Grievants?

Discussion

The operative facts pertain to a work stoppage which occurred on December 10, 1975 when the first shift, scheduled to report for work at 7:00 A.M., failed to do so at the scheduled time. The Employer is a public utility supplying electric service to certain eastern counties in Pennsylvania. The three grievants were a senior shop steward and two executive board members of the Local Union, each of whom received a three day suspension. The Company disciplined 65 employees for their

participation in the work stoppage. Forty-seven employees received a one day suspension because they allegedly had also participated in a previous work stoppage. Fifteen other employees received a written warning since they had not previously participated in any work stoppage.

Article XI captioned "No Strikes — No Lockouts" states:

> "11.1 The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public."

The principal witness for the Company, Mr. Honecker, Station Shift Supervisor, testified that he received a telephone call at home, about 7:05 A.M. on the day of the incident from the shift foreman on duty, informing him that the 7:00 A.M. shift people were not reporting for work. (Although the regular shift commences work at 7:00 A.M., the maintenance force generally report around 6:30 A.M. in order to relieve their counterparts). The Shift Supervisor testified that he asked the Foreman to ascertain what was causing the problem and to call him back. About 7:20 A.M., the Foreman telephoned Mr. Honecker to say that these men were not reporting for work because there was an outside contractor performing work in the Plant. The Supervisor testified that he immediately drove to the Station, arriving there at about 7:30 A.M. He testified that there was a long line of automobiles parked on the shoulder of the road leading to the Station, and groups of employees milling about. He further stated that he drove past the line of automobiles looking for a union officer. As he reached the head of the line, he saw Grievant Ott

standing and talking to a group of employees. Mr. Ott was a senior Shop Steward of the Local Union.

Mr. Honecker stated that he asked the Grievant what was the problem and he was informed that the strike was the result of outside contractor doing work in the Station. The Supervisor stated that he informed Mr. Ott that this was an illegal work stoppage and he should order the employees to report for work. He further testified that the Shop Steward gave no indication that he would comply with the instructions given him. He added Mr. Ott said nothing to the employees around him. Mr. Honecker testified that, when it was apparent that Mr. Ott had no intention of asking the employees to go to work, he again reminded him that the work stoppage was illegal and he should order the employees to return to work. Mr. Honecker testified that he further informed the Shop Steward that he would stop the outside contractor from performing work until the Company and Union could meet and discuss the problem. Honecker stated that this offer evinced no effort from Mr. Ott to getting the men to go to work. The Shop Steward did ask Mr. Honecker to bring Mr. Oyer, President of the Local Union, out of the Plant to talk to him. The Supervisor stated that he immediately went into the Plant and returned with Mr. Oyer, Mr. Sheafer, a Union representative, and Mr. Mel Leib, a Supervisor of Maintenance. Honecker testified that he had informed these three individuals what had transpired between Ott and him. He further testified that he again instructed Ott, in the presence of the others, that the employees were engaged in an illegal work stoppage and that Ott should direct the employees to report for duty. He repeated his offer to stop the outside contractor from working until they discussed the problem. Mr. Honecker asserted that at first Mr. Ott took no action in response to his offer. A few moments later, Ott turned to a group of employees and said: "What do you say fellows?" Honecker stated that there was complete silence for a few minutes, and then some

one in the group of employees distinctly said: "We have nothing to lose, we can always do it again." Thereafter, employees walked to the automobiles and drove into the Station. It was now 8:00 A.M. Mr. Honecker asserted that the prior shift had been retained to work, and thus it was necessary to compensate them for an additional two and a half hours at premium rates.

Mr. Ott's version of the events on the morning in question was that at about 7:20 A.M. while he was in a coffee shop, in town, two individuals, one a Plant employee and the other not, approached him and stated that there was trouble at the Plant and he had better get down there. He did so and saw a long line of cars along side of the road leading to the Plant. He stated he pulled off the road and parked his car last in line. He inquired of an employee in a parked car what was going on, and then proceeded to walk to the head of the line of cars where a group of people were congregated. At this time Mr. Honecker drove up in his car, rolled down the window, and asked what was the problem. Mr. Ott replied, "I don't know, I just arrived". The Shop Steward stated that Mr. Honecker did not get out of his car but drove into the Plant. Mr. Ott further testified that he thought he should contact a higher union official and he asked an employee to drive him to the telephone at the gate of the entrance to the Plant. He added that he reached Mr. Oyer and told him of the situation. He further testified that Mr. Oyer told him to go tell the employees to report for work and he replied that he would. Mr. Ott stated that he returned to the line of cars and told the people that they should go into the Plant and that the issue could now be resolved. He added that he told all the employees that it was his duty to tell them to return to work. Mr. Ott further testified that he went down the line of parked cars giving the employees therein this message. While he was so doing, Mr. Honecker arrived with Mr. Oyer and Mr. Lieb.

Mr. Ott stated that Mr. Honecker never personally told him to go back to work or to ask the men to do so. He initially only asked "what was the matter"? and then drove on. It was Mr. Oyer and not Mr. Honecker who instructed him to direct the employees to report to work.

Mr. Ott testified that he saw the other two grievants, Mr. Weiss and Mr. Starner for the first time when he returned from telephoning Mr. Oyer but he did not speak to them, nor did he ask then to assist him in getting the men back to work.

Mr. Ott stated that he only talked to employees in their cars and did not address any group standing around at the head of the line.

Grievant Weiss testified that when he arrived at the Plant he found a long line of cars parked. He pulled off the road and ascertained that the reason the employees in the cars had not reported for work was because they were unhappy that an outside contractor was working in the Plant while bargaining unit employees were on layoff. Mr. Weiss stated that when he reached the head of the line he learned from Mr. Oyer that all employees were to report for work, so he retraced his steps and stopped at about 10 out of the 40 or 50 parked cars, and told the occupants that they were to report for work. He added that he had to explain at each car what was happening. He stated in cross examination that he did not see Grievant Starner going down the line of cars, but he did see him at the head of the line. He stated he never saw Mr. Ott.

Grievant Starner testified that when he arrived at the Plant, he saw a string of cars parked and so inquired what was wrong. He said some men replied while others did not. He stated that he told them that their actions were illegal and that they should go into the Plant while the matter was being straightened out. He testified that he spoke to the occupants of about 8 to 12 cars and several cars had more than one occupant.

Mr. Honecker also stated that the Union had been informed during the week preceding the work stoppage that a subcontractor would be coming into the Plant, but no grievance had been filed at any time by the Union on this matter.

Company's Position

The Company conceded that there is a conflict in the testimony of the principal witnesses which the Arbitrator will have to resolve. It stressed, however, that Mr. Honecker's version is more probable. It was unlikely that Mr. Honecker, in charge of Plant operations, arriving at the entrance of the Plant, seeing the employees of 7:00 A.M. shift not at work, and observing the Chief Union Steward, would not ask him to get the men back to work, but rather would lose valuable time to go into the Station to secure another person to get the men back into the Plant.

The Company stressed that Mr. Ott was not able to remember a number of significant matters such as whether Mr. Honecker told him that he would take the outside contractor off the job or the names of the employees he spoke to outside of the Plant. The Company stated that if Mr. Ott called Mr. Oyer on the telephone while Oyer was in the Plant, Mr. Oyer was not called as a witness to corroborate it, even though Mr. Oyer was present at the arbitration hearing.

The Company also noted that Mr. Ott's testimony indicated that he only talked to individual employees. At no time did he attempt to call employees together to urge them as a group to return to work. Nor did he ever seek to join forces with the other two Grievants who were Executive Board members to assist him in getting the illegal work stoppage ended.

The Company stressed that the evidence showed that Grievants Weiss and Starner made some desultory and individual efforts to suggest to individual employees that they should return to work.

The Company stated that its differentions in disciplinary sanctions between Union officials and rank and file union members are well founded, both on general principles as well as the particular facts surrounding these Grievants. Arbitration case law has now firmly established that union officials are subject to selective discipline for participating in an illegal and unauthorized work stoppage. Union officials, by virtue of their office, have a special obligation to honor and protect the collective bargaining agreement from being breached.

In this particular Local Union, there is even a higher standard for union officers to observe and maintain. Two prior arbitration awards have been rendered pertaining to the responsibilities of those local union officers where an illegal work stoppage has occurred. Two arbitrators have set forth clearly and decisively the obligations of those local union officials. The Awards stated that these officials had the duty, by virtue of their office, not only to get the employees back to work, but also not to participate in any way in the illegal stoppage. The Company asserted that not to participate, means, at the least, to report for work themselves. The Company asserted that the Union leadership failed to meet their obligations to terminate the work stoppage, obligations of which they had been fully apprized.

The Company urged that its disciplinary sanctions must be upheld in order that the Local Union and its official representatives clearly understand their contractual obligations to the Company, to the employees, and to themselves under the no strike — no lockout provision.

Union's Position

The Union stated that the Company has misapplied its disciplinary authority in punishing these three Grievants. The evidence shows that as soon as they became award of what was transpiring at the Plant when they reported for work on the morning of the day in question,

they took all the necessary measures as promptly as they could under the circumstances. The Grievants learned, for the first time when they reported for work, that their fellow employees were refusing to go to work because the Company was utilizing an outsider contractor while employees were in lay-off status. The employees were upset and the Grievants needed some time to discuss this matter with the employees and point out to them that what they were doing was wrong, and they should report for work and let the problem be resolved through the appropriate procedures of the collective bargaining agreement. The Union asserted that there was no delay on the part of the Grievants in attempting to get the employees back to work, except for one quick telephone call to the Local Union President, to obtain his assistance in getting the men back to their jobs.

The Union stated that the Company is in error when it contends that the Grievants failed to take positive and affirmative action to end the work stoppage and did not exercise the necessary leadership expected of them. On the contrary, the evidence of record reveals that the Grievants did everything in their power to get the employees back to work. The delay of 20 minutes in the first shift reporting for duty cannot be attributed to the Grievants. The delay was caused by the union membership failing to comply with the request of their leaders.

The Union further stated that the Grievants had no advance knowledge of the work stoppage, and they learned of it only after they reported to the work location. There was no delay in their efforts to get the men back to work, once they were apprized of the situation. They should have been commended rather than censured for their efforts.

The Union denies that the two prior arbitration awards involving this local union, so heavily relied upon by the Company, are in point. These two awards involved situations where, in one case, the grievants re-

fused to cross an informational picket line and report for work, and the union leaders make [sic] no attempt to get the employees to return to work.

In the other case, the union leaders made no immediate efforts to get the employees to return to work but made a series of telephone calls to ascertain their responsibilities, with the concommitant result that the work stoppage continued for three hours. None of these awards is the instant case. The record of this case is replete with the prompt efforts of the three Grievants to get the men to return to work in the Plant.

Findings:

We find the evidence of record supports the discipline assessed against Senior Shop Steward Ott. We find that the evidence of record does not support the exact selective discipline imposed upon Executive Board Members Weiss and Starner, although their overall conduct warrants some measure of discipline.

There is substantial competent evidence to support the Company's charge that Mr. Ott was derelict in fulfilling his obligations as a responsible union officer, to ensure that the employees were told, with dispatch and firmness, that the Union would not countenance their improper and unauthorized conduct in withholding their services, in a concerted manner, from the Company because of a fancied wrong.

There is evidence to show that Mr. Ott, did not, of his own initiative, direct the men collectively to go into the Plant to carry out their job duties. Mr. Ott's own testimony does not indicate that he urged the men, who were at the head of the line, to cease and desist from their improper and delictual conduct. He only contended that he spoke to his fellow employees separately and individually to return to work. However, there is probative evidence to show that Mr. Ott took no affirmative action initially to have the employees enter the Plant when he was first accosted by Mr. Honecker. Subsequently, when Mr. Honecker returned with Mr. Oyer and two

others, and again told Mr. Ott to inform the men to return to work. Mr. Ott was passive and took no direct action to say "what do you say fellows" to his fellow employees. These facts were in some measure corroborated by Union Witness Ferretti. He testified that he heard some employee respond "We have nothing to lose. We can go out again".

There may be a dispute as to whether it was Mr. Oyer or Mr. Ott who addressed a group of employees at the head of the line. There is no dispute that Mr. Ott exercised no firm leadership role, by urging the men to honor their no strike pledge and settle their dispute over the use of an outside contractor through the existing contractual machinery. Mr. Ott's conduct was passive and ineffective, and the Company could properly determine that he was guilty of failing to meet his responsibility as a senior Shop Steward to secure compliance with a significant and meaningful contract provision. Secondly, it was not discriminatory action for the Company, under these circumstances to levy a heavier sanction on Mr. Ott than on rank and file employees who were only participants in the unauthorized work stoppage.

When however, we review the evidence concerning Messrs. Weiss and Starner's dereliction of duty, we find it inconclusive. No Company official testified that they saw these two Grievants. There is no probative evidence either that they took either a passive or negative role, or that they encouraged or urged the employees to breach the no strike pledge. Their impact, one way or the other, was not observed or noted by any Company official.

On the other hand, both Grievants testified, which testimony was not impeached, that they visited the parked cards urging the occupants thereof to report for work. They may not have executed this duty with as much dispatch or expedition as the situation warranted, but there is no evidence in the record that they hindered or interfered with the efforts to get the employees back to work. Absent any evidence in the record that these

two Grievants failed to carry out their obligations as union officials, they should be treated as participants in the unauthorized work stoppage, and punished as participants, rather than as delinquent union officials.

AWARD: Discipline of Grievant Ott sustained.
Discipline of Grievants Weiss and Starner modified to a one day suspension.

/s/ JACOB SEIDENBERG
Jacob Seidenberg, *Arbitrator*

December 26, 1975

Joint Appendix

Office - Supreme Court, U.S.
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No. 81-1664

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

METROPOLITAN EDISON COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

LOCAL UNION 563, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Intervenor

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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Petition for Certiorari Filed March 4, 1982
Certiorari Granted June 14, 1982.

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The following opinions, decisions, judgment, orders and trial exhibits have been omitted from printing in this appendix because they appear at the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the United States Court of Appeals for the Third Circuit, Dated November 13, 1981 A-1

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Metropolitan Edison's Exhibit No. 3—Award and Opinion of Arbitrator Wayne E. Howard in International Brotherhood of Electrical Workers, Local 603 and Metropolitan Edison Company, American Arbitration Association Case No. 14 30 0982 72 H, Dated May 30, 1973 ..... A-52

Metropolitan Edison's Exhibit No. 6—Award and Opinion of Arbitrator Jacob Seidenberg, Esquire, in International Brotherhood of Electrical Workers, Local 603 and Metropolitan Edison Company, American Arbitration Association Case No. 14 30 0712 75 H, Dated December 26, 1975 ..... A-62

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 9, 1978—Intervenor Local 563's unfair labor practice charge against Metropolitan Edison Company filed with Region 4 of the National Labor Relations Board.

February 27, 1978—National Labor Relations Board issues Complaint against Metropolitan Edison.

March 9, 1978—Metropolitan Edison's Answer filed.

July 17, 1978—Hearing before Administrative Law Judge Michael O. Miller.

December 11, 1978—Decision of Administrative Law Judge.

December 11, 1978—Order Transferring Proceeding to National Labor Relations Board.

January 2, 1979—Metropolitan Edison's Exceptions to Decision of Administrative Law Judge filed with National Labor Relations Board.

September 30, 1980—Decision and Order of National Labor Relations Board.

November 7, 1980—Metropolitan Edison's Petition for Review of National Labor Relations Board Order filed with the United States Court of Appeals for the Third Circuit.

November 13, 1981—Opinion of the Court of Appeals for the Third Circuit.

December 9, 1981—Judgment of the Court of Appeals for the Third Circuit.

December 22, 1981—Metropolitan Edison's petition for rehearing en banc filed.

January 5, 1982—Order denying rehearing en banc.

January 11, 1982—Metropolitan Edison's motion for stay of mandate filed.

January 20, 1982—Order staying issuance of certified judgment in lieu of formal mandate.

February 5, 1982—Metropolitan Edison's motion for further stay of mandate filed.

February 12, 1982—Order further staying issuance of certified judgment in lieu of formal mandate.

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO
LOCAL 603
- and -
METROPOLITAN EDISON COMPANY
CASE NUMBER: 14 30 0983 72 H

AWARD OF ARBITRATOR

The undersigned arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated May 1, 1970 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

Grievance No. 35-72E

Those employees who on April 19 and 21, 1972 refused to cross the picket line to carry out their work assignments were suspended for one and one-half days for proper cause. The Union grievance is denied.

Grievance No. 45-72E

The written warnings for engaging in a work stoppage on April 20, 1972 were issued by the Company for proper cause. The Union grievance is denied.

George A. Handelong
Union Arbitrator
Concurring:
Dissenting:

Richard O. Keim
Company Arbitrator
Concurring:
Dissenting:

S. Stanley Alderfer
Impartial Arbitrator's signature (dated)
February 13, 1973

STATE OF
COUNTY OF } ss.:

On this day of , 19 , before me personally came and appeared

to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

In the Matter of Arbitration between		
INTERNATIONAL	:	
BROTHERHOOD OF	:	
ELECTRICAL WORKERS,	:	
LOCAL 603	:	OPINION OF
- and -	:	IMPARTIAL
METROPOLITAN EDISON	:	ARBITRATOR
COMPANY	:	
Case No. 14 30 0983 72 H	:	

Appearances: For the Union — A. J. Duhrkopp, International Representative; William Rush, Jr., Past President Local 603; William Rounsaville, President; Donald R. Hunt, Shop Steward; Florian J. Seyfert, Frank L. Hendershot, Witnesses; William J. Stout, William B. Shepherd, Union members.

For the Company — Kleinbard, Bell & Brecker by Joseph Bell, Counsel; Guy L. Davis, Assistant to V. Pres., Operations; Harry G. Steckel, Superintendent, Construction and Maintenance; Robert J. Brudereck, Operating Superintendant; Henry L. Robidoux, Division Manager; Robert E. Creveling, Personnel Director; Richard E. Pleiss, Ernest V. Morris, Paul R. Harak, Supervisors; Thomas R. Kostenbader, District Manager.

Grievance No. 35-72E dated April 20, 1972 reads:

> Local 603 on behalf of all the Brothers and Sisters charges Company with violations of Article I, Section 1, Article 9 — Section 2, Article 12 — Section 2 of the present agreement.

Grievance 45-72E, dated June 6, 1972 reads:

> I am aggrieved by the disciplinary action dated May 2, 1972, in that the disciplinary action was not reviewed with me by my immediate supervisor pursuant to the collective bargaining agreement and that the disciplinary action is discriminatory and inconsistent with past practices. The disciplinary action warning is being used only to influence my actions and vote concerning the pending collective bargaining agreement.

Background

The Company is a public utility operating in the central and eastern portions of Pennsylvania. The Company has a collective bargaining agreement with Local 603 and four other locals of IBEW operating through their System Council. In the Spring of 1972 a Howard Johnson Motel was being built near the Delaware Water Gap which required electrical service by April 19, 1972. In early April the Company's maintenance and construction crews were installing a podmount transformer on the motel property. During the greater part of April an informational picket line was posted at the motel site by the Building Trades Council complaining that the motel was being built with non-union labor.

On April 19, 1972, the Company assigned a four-man crew to work at the motel site. When they arrived they refused to cross the picket line. After refusing several times they were sent home and given disciplinary layoffs of one and one-half days.

On the morning of April 20, 1972 the employees of the East and three other districts, approximately 200 men, did not report for work but congregated at the parking lot refusing to start work until the Company reinstated and paid the four men suspended the preceding day. They returned to work about two hours later. All were given written warnings for this concerted action.

On April 21, 1972 a crew of six men were dispatched to the motel work site. Upon arriving at the site they refused to cross the picket line. They were suspended for three days without pay but subsequently the penalty was reduced to one and one-half days.

When the instant grievances were not resolved in the grievance procedure the Union referred them to the American Arbitration Association under date of November 13, 1972. The undersigned was selected to serve as the impartial arbitrator on January 19, 1973 and a hearing was held at Easton, Pennsylvania on January 30, 1973.

Positions of the Parties

The Company claims that the disciplinary action taken was proper for the following reasons:

The refusal of four employees to cross the two-man picket line on April 19, 1972 was a violation of the no-strike pledge. They crossed the picket line earlier and others had also done so. Some fellow employees crossed it the very same day.

The Agreement has no "picket line clause" permitting employees not to cross certain types of picket lines.

The Union refused to even try to cross the picket line.

The refusal of six employees to cross the picket line on April 21, 1972 was even less excusable because the Company talked to the pickets and offered to have a supervisor accompany them on the truck.

Courts issue injunctions to cross mass picket lines and only if the Union tells the court it tested the line will the court refrain from citing contempt. Ordinarily a picket line is large and is posted where there is a strike and bitterness. This was an informational two-man picket line which cannot prevent entry or egress under the law.

The allegation of a threat to safety was not raised by the employees who refused to cross the line on April 19th and 21st. There was no evidence of latent or potential violence.

The employees wilfully refused to work on April 20, 1972 in violation of the contract. The written warning to each employee was the mildest form of discipline possible.

The Union contends that the suspensions and written notices violated the Agreement for the following reasons:

On April 19 and 21 picket lines existed and the employees believed that crossing them would be a threat to their personal safety.

The Company disregarded the request of the Union and the employees to guarantee their safety in crossing the picket line.

The Union offered alternatives such as going in when the picket line was not posted and then working overtime but they were rejected by the Company.

There can be no proof of safety until an attempt is made to cross a picket line but such attempt does not guarantee safety.

Since these ten employees believed it was unsafe to cross a picket line it was proper to refuse to cross it, and the suspension should be revoked.

The written warnings were not reviewed with the employees which was contrary to past practice and also discriminatory.

The Issue

Were the suspensions for the incidents of April 19th and 21st and the written warnings for the incident of April 20, 1972 issued for proper cause?

Findings

The Agreement in effect at the time of the incidents here involved is dated May 1, 1970 and was in effect for a two-year period. The relevant provisions remain unchanged in the succeeding agreement. Article II, paragraph 2.1 reads:

> It is understood by the parties to this agreement that the right to hire, to transfer, to reassign, to demote, to discipline, to lay off and to discharge employees for proper cause, is vested in the Company, subject to the limitations of this Agreement.

Article XI, entitled NO STRIKES — NO LOCKOUTS reads:

> 11.1 The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall

be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continued service to the public.

Article IX sets out the grievance procedure and provides for ultimate settlement of grievances by a three-member Board of Arbitration.

The facts leading to the one and one-half day suspensions of four employees on April 19 and six employees on April 21, 1972 for refusing to cross a picket line to carry out work assignments, the majority of which are not in dispute, are as follows:

On most workdays in April the building trade unions posted an informational picket line at the aforesaid motel construction site. The picket line usually consisted of four men, two at each of two entrances, carrying placards stating that the contractor was employing non-union labor. On April 19, 1972 the Company assigned a four-man crew to work at the aforesaid job site. They did not object to the assignment but when they arrived at the site they refused to cross the picket line to perform the assigned work. The same four-man crew carried out its assignment at the site the preceding day. On April 19th others from the bargaining unit also were assigned to the site and carried out their work orders.

Harry Steckel, Superintendent of Construction and Maintenance and Paul Harak, Supervisor, requested William Rush, President of the local union at that time, to ask the men to cross the picket line. He replied that he would not tell the four men to cross or not to cross the picket line and that it was up to them to decide whether or not it was safe. Steckel then asked the men to cross the line and they refused, whereupon he sent them back to the shop. At about 11:00 A.M. there was a meeting of Company and Union officials during which Rush again repeated that he would not order the men to cross the picket line. At 12:30 P.M. Harak instructed the crew to return to the site and carry out the assignment pointing

out that if they refused they would be suspended. They refused again and were suspended for one and one-half days.

On April 21 the Company dispatched a six-man crew to the same job site and they too refused to cross the picket line to perform their assignment. Steckel and Harak asked one of the pickets if they would prevent their men from entering and he replied in the negative stating that pickets were not there for the purpose of keeping people from going in. Steckel offered to ride into the site with the men on the truck. These six men were suspended for one and one-half days.

The Company points out that it has been its policy not to ask employees to cross a picket line if there is any evidence that it is unsafe and that it would not ask men to cross a picket line when the pickets are members of a striking union. In this case the pickets were not related in any way to Local 603 and they had no grievance against the Company. The preponderance of the evidence fails to show that the presence of this informational picket line posed any latent danger or threat to safety in crossing it. To the contrary, the evidence indicates it was a peaceful picket line directed solely at the contractor who was building the motel. The undisputed testimony of Supervisor Harak establishes that on April 19 he crossed the picket line with a foreman in a Company truck and also in his own car. The record also shows that the Union made no effort to test the picket line to determine if it would be unsafe to cross it. President Rush testified that he did not ask the pickets to let his men through the line. He also testified that when he telephoned International Representative Durhkopp on the night of April 19th he was asked if the safety of the men was at stake and he replied that he did not know.

There is also some evidence of harassment by fellow employees which may have influenced them not to cross the picket line. Harak testified that on the morning of April 18, 1972 he was approached at the job site by a

union member who said another member told him they could be fined by the Union for crossing the picket line. This was reported immediately to President Rush who had been unaware of it. On the evening of April 18 Rush reported to Messrs. Brudereck, Steckel and Harak that he found there was some harassment and that he would look into it. Harak also testified that on April 21 Shop Steward Hunt stated that it was a legal picket line. Steckel and Harak both testified that none of the ten men who refused to cross the picket line made any mention to them of their concern for their safety. Harak testified that Rush did raise the question of safety on April 19th.

The Union stressed the argument that whether or not the picket line appeared to be peaceful it is impossible to be sure there is no threat to one's safety until the line is crossed. As indicated hereintofore the Union leadership and the ten employees involved made no effort to test the line to determine whether or not it would be safe to cross it to perform the assigned work. Under the prevailing circumstances the ten employees violated three provisions of the contract. First, they violated the management rights clause. Article II, Section 1 reserves to the Company the right, among others, to assign work orders. This right is absolutely basic to the operation of the enterprise. This same provision also gives the Company the right to discipline for proper cause such as failure to carry out work orders. The Union position that these employees did not refuse to carry out an assignment but merely refused to cross a picket line is not persuasive. The fact remains they failed to perform specific tasks assigned on April 19th and 21st.

The refusal of these ten employees to cross the picket line to carry out their assignments was also a clear violation of Article XI, the no-strike provision quoted hereintofore. This provision is eminently clear and the Union does not claim that it is ambiguous. Nevertheless, when the Union argues that its members have no obliga-

tion to cross a picket line if they feel it would be unsafe to do so, it is claiming an exemption to the no-strike clause that appears nowhere in the contract. In the absence of a provision which specifically states that employees are not required to cross any picket line the no-strike provision must be upheld. The aforesaid violation of Article II, Section 1 and Article IX also constitute violation of Article XII, Section 2. Therefore, it is held that the Company suspended for proper cause the four employees on April 19 and the six on April 21 who refused to cross the picket line to perform their work assignments. The Company did not violate the Agreement as charged by the Union.

The April 20, 1972 Work Stoppage

The facts of this incident are not disputed. The majority of the employees of the Easton and three other districts report for work at 7:30 A.M. and the remainder at 8:00 A.M. At about 7:00 A.M. President Rush and two other officers of the local union saw Messrs. Steckel and Brudereck and advised that the employees would not work unless the four employees who were suspended the preceding day were reinstated and paid. The Company advised it would not discuss the matter until the employees reported to work. Rush then reported to the striking employees that the Company would not discuss the matter until they reported for work. He admits he did not tell the men they should go to work and file a grievance later. Rush then telephoned an official at headquarters of the International Union. He testified he was told it was an informational picket line and that the Company was right in not talking to the employees until they returned to work. He told the employees they must go back to work but they refused. Mr. Brudereck then talked to the men in the parking lot at the request of Rush. He ordered them to report to their jobs at 10:00 A.M. and stated that anyone who did not report by 10:15 would be sent home. The work stoppage ended at 10:00 A.M.

This work stoppage or strike was an obvious violation of the Union's no-strike pledge as contained in Article XI. It was likewise a flagrant violation of Article IX which provides that any dispute or grievance shall be processed through the grievance procedure and arbitration. The contract provides for no exceptions whatsoever. No matter what was on the minds of these 200 employees it was their clear obligation under the contract to report to work and then file a grievance. The president of the Union was in error, as he admitted, when he failed initially to instruct the striking employees to report to work and file a grievance later. The Company issued written warnings to all these employees for just cause and under the circumstances this penalty was extremely mild.

For the foregoing reasons both grievances are denied.

S. STANLEY ALDERFER
Impartial Arbitrator

February 13, 1973

JA-14 *Metropolitan Edison's Exhibit No. 4*

RECORD OF DISCIPLINARY ACTION

Name David C. Lang — Date November 8, 1973
Department Three Mile Island Nuc. Gen. Sta. — Division Lebanon
Occupation (1102) Instrument Man-1st Class-Nuclear

REASONS FOR DISCIPLINE

	VIOLATION OF	UNSATISFACTORY
☐ DISHONESTY	☒ RULES	☒ PERFORMANCE
☐ INSUBORDINATION	_Leaving work place	_Inaccurate
☐ INTOXICATION	X Misconduct	_Low output
☐ THEFT	_Safety	_Undependable
☐ TARDINESS	_Smoking	X Uncooperative
☐ ABSENTEEISM	_Other	_Poor Public Relations

☒ OTHER JUST CAUSE Participating in unlawful work stoppage

DESCRIPTION OF CIRCUMSTANCES

Beginning approximately at 11:00 P.M. on Wed., Oct. 31, 1973, and continuing until 11:00 P.M. on Nov. 2, 1973, you as an employee of the Middletown District, Metropolitan Edison Company, failed to report for work at your scheduled starting time. Members of Local Union 563, IBEW, engaged in picketing at various locations throughout the Middletown District. This action constitutes an unlawful work stoppage and is in violation of Art. XI, Section 11.1 (No Strike - No Lockouts) of the current labor agreement between all of the Local Unions of System Council U-9 and Metropolitan Edison Company.

This action resulted in delays to the construction and start-up test procedures for Three Mile Island Generating Station and disruption of the normal activities of the Company in the Middletown District.

ACTION TAKEN: ☐ Warning ☒ Suspension for 25 days ☐ Discharge

REMARKS: This disciplinary action is being administered to you for your failure to report for work at your scheduled time and place and for your participation in the unlawful work stoppage.

In addition, you are being disciplined for your failure as an elected official of Local Union 563, IBEW, to demonstrate to the Company, in an objective manner, your affirmative duty as an elected official to:

(a) make every effort to uphold the sanctity of the Agreement and its established grievance procedures
(b) make every bona fide effort to prevent the unlawful work stoppage
(c) make every effort, including returning to work yourself, to end the unlawful work stoppage and the picketing

Any further similar action by you may result in more severe disciplinary action, including discharge.

Signed G. L. Davis

Reviewed with employee
11/12/73

RD-2 ME 12-58

Metropolitan Edison's Exhibit No. 5 JA-15

RECORD OF DISCIPLINARY ACTION

Name Gene R. Light Date November 8, 1973
Department Three Mile Island Nuc. Gen. Sta. Division Lebanon
Occupation (1131) Utility C & M Man-1st Class-Nuclear (Prob.)

REASONS FOR DISCIPLINE

	VIOLATION OF	UNSATISFACTORY
☐ DISHONESTY	☒ RULES	☒ PERFORMANCE
☐ INSUBORDINATION	_Leaving work place	_Inaccurate
☐ INTOXICATION	x Misconduct	_Low output
☐ THEFT	_Safety	_Undependable
☐ TARDINESS	_Smoking	x Uncooperative
☐ ABSENTEEISM	_Other	_Poor Public Relations

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This action resulted in delays to the construction and start-up test procedures for Three Mile Island Generating Station and disruption of the normal activities of the Company in the Middletown District.

ACTION TAKEN: ☐ Warning ☒ Suspension for 25 days ☐ Discharge

REMARKS: This disciplinary action is being administered to you for your failure to report for work at your scheduled time and place and for your participation in the unlawful work stoppage.

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(a) make every effort to uphold the sanctity of the Agreement and its established grievance procedures
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(c) make every effort, including returning to work yourself, to end the unlawful work stoppage and the picketing

Any further similar action by you may result in more severe disciplinary action, including discharge.

Signed G. L. Davis

Reviewed with employee
11/12/73

RD-2 ME 12-58

JA-16 *General Counsel's Exhibit No. 2(a)&(b)*

RECORD OF DISCIPLINARY ACTION

Name Gene R. Light — Date September 9, 1977
Department Three Mile Island — Division Lebanon
Occupation (1130) Utility C&M Man-Chief-Nuclear

REASONS FOR DISCIPLINE

	VIOLATION OF	UNSATISFACTORY
☐ DISHONESTY	☐ RULES	☐ PERFORMANCE
☐ INSUBORDINATION	_Leaving work place	_Inaccurate
☐ INTOXICATION	_Misconduct	_Low output
☐ THEFT	_Safety	_Undependable
☐ TARDINESS	_Smoking	_Uncooperative
☐ ABSENTEEISM	_Other	_Poor Public Relations

☒ OTHER JUST CAUSE Failure to report for work as scheduled and participation in an unlawful work stoppage.

DESCRIPTION OF CIRCUMSTANCES

On the morning of August 30, 1977, the majority of members of Local 563 IBEW failed to report to work as scheduled and participated in an unlawful work stoppage. They continued their participation in this unlawful work stoppage until approximately noontime of the same day.

ACTION TAKEN: ☐ Warning ☒ Suspension for 25 days ☐ Discharge

REMARKS: This discipline is being administered to you for your failure to report to work at your scheduled time and place and for your participation in an unlawful work stoppage.

In addition, you are being disciplined for your failure as an elected official of Local Union 563 IBEW to demonstrate to the Company, in an objective manner, your affirmative duty as an elected officer to:

(a) Make every effort to uphold the sanctity of the Agreement and its established grievance procedures.
(b) Make every bona fide effort to prevent the unlawful work stoppage.
(c) Make every effort, including returning to work yourself, to end the unlawful work stoppage.

Your participation in any unlawful work stoppage in the future will result in your immediate discharge.

Signed D. M. Shevlin

Reviewed with employee
9/13/77

RD-2 ME 12-58

RECORD OF DISCIPLINARY ACTION

Name David C. Lang — Date September 9, 1977
Department Three Mile Island — Division Lebanon
Occupation (1102) Instrument Man-1st Cl.-Nuclear

REASONS FOR DISCIPLINE

	VIOLATION OF	UNSATISFACTORY
☐ DISHONESTY	☐ RULES	☐ PERFORMANCE
☐ INSUBORDINATION	_Leaving work place	_Inaccurate
☐ INTOXICATION	_Misconduct	_Low output
☐ THEFT	_Safety	_Undependable
☐ TARDINESS	_Smoking	_Uncooperative
☐ ABSENTEEISM	_Other	_Poor Public Relations

☒ OTHER JUST CAUSE Failure to report for work as scheduled and participation in an unlawful work stoppage.

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Your participation in any unlawful work stoppage in the future will result in your immediate discharge.

Signed D. M. Shevlin

Reviewed with employee
9/13/77

RD-2 ME 12-58

[1] **BEFORE THE NATIONAL LABOR RELATIONS BOARD**

FOURTH REGION

In the Matter of:	:	
METROPOLITAN EDISON COMPANY	:	
and	:	Case No. 4-CA-9144
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 563, AFL-CIO.	:	

Courtroom 2
9th Floor
Federal Building—Court House
3rd and Walnut Streets
Harrisburg, Pennsylvania
Monday, July 17, 1978

The above-entitled matter came on for hearing, pursuant to Notice at 11:00 a.m.

BEFORE:

Honorable MICHAEL O. MILLER, Administrative Law Judge

APPEARANCES:

ROBERT T. KOFMAN, Esq.	National Labor Relations Board Fourth, Region, Federal Building 6th and Arch Streets, Philadelphia, Pennsylvania appearing as Counsel for the General Counsel.
GEORGE A. BURNSTEIN, Esq.	United Engineers Building 30 South 17th Street Philadelphia, Pa. appearing on behalf of the Respondent.

[2]

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[7] (The above referred to document were marked General Counsel Exhibits No. GC-2(a) and 2(b), GC-3(a) and 3(b), 4, and 5 for identification and received in evidence.)

JUDGE MILLER: All right. Continue.

MR. KOFMAN: Did you want to offer your stipulation.

MR. BURNSTEIN: Yes. Your Honor, Counsel for the General Counsel and I had discussed possibly a short stipulation to set the scene and if you have no objection perhaps I could state what I believe to be what we had agreed to on the record.

JUDGE MILLER: Very well. I have no objection. In fact, I encourage it.

MR. BURNSTEIN: Well, I believe that Counsel for the General Counsel and myself are prepared to stipulate that: at approximately 6:00 a.m. on August 30, 1977, a picket line composed of members of the Operating Engineers Union appeared at the north gate entrance to Metropolitan Edison's Nuclear Generating Station located at Three Mile Island in the State of Pennsylvania. Due to the presence of the pickets, employee members of Local 563 of the IBEW who were then employed by Metropolitan Edison failed to report to their work assignments during the morning of August 30.

As a result of the interruption of work, the Company in turn administered discipline to members of the bargaining unit of IBEW employees who were members of Local 563 and such discipline
[8] consisted of a twenty-five day suspension to Messrs. Lang and Light, ten day suspensions to a group of fourteen other employees, and five day suspensions to a group of one hundred twenty-one employees.

The exhibits offered by General Counsel as GC-2(a) through GC-5 are a representative example of the type of discipline I have just articulated.

MR. KOFMAN: I would just add one point and that it is at the time the discipline was administered that Mr. Lang was president of Local 563 and the Mr. Light was vice president of Local 563.

MR. BURNSTEIN: That is agreeable to me and I am prepared to stipulate to all of the facts receited.

MR. KOFMAN: I stipulate to that also.

JUDGE MILLER: I will accept the stipulation.

MR. KOFMAN: At this time, again pursuant to off the record discussion, the parties have agreed that Respondent would present its case first in the form of an affirmative defense to the allegations in the Complaint.

JUDGE MILLER: Let me ask you for one further point, perhaps by way of stipulation, is there any question but that the work stoppage was a breach of the collective bargaining agreement.

MR. KOFMAN: No, that is not an issue of the litigation. We stipulate that it was in contravention of the no strike clause.

[9] MR. BURNSTEIN: That procedure, as outlined by the Counsel for the General Counsel, is perfectly all right with me and I agreed to it and I would only like to ask one question. As I understand it, the General Counsel has presented a prima facie case in terms of decisions currently unreversed by the Board. The Board's posture is that on the facts that we have stipulated to, he has presented his prima facie case.

I, in turn, have indicated to you that my defense is in the nature of an affirmative defense and therefore, I now have the burden of going forward. However, General Counsel, it was my feeling just now, must rest his case on theory that we are prepared to stipulate and go forward. I do not want to present my case and find myself defending a new theory.

JUDGE MILLER: I would not expect you to.

MR. BURNSTEIN: Well, as long as it is clear in the minds of everybody concerned.

JUDGE MILLER: Well, to clarify it, first, let me, for the record, accept General Counsel's stipulation as to the illegality of the work stoppage so that that point is clear on the record.

MR. KOFMAN: Yes, sir.

JUDGE MILLER: Second, let's have General Counsel make a brief statement of what his theory
[10] is before he rests so that you know precisely what it is that you are putting in an affirmative defense to.

MR. KOFMAN: Your Honor, General Counsel views the issue in the case as whether Respondent in singling out the union president and vice president for a greater discipline than was given to rank and file employees participating in a work stoppage in contravention of a no strike clause in the contract was premised upon their status as union officials. The Board in a decision last year called Precision Castings held that an Employer violates Section 8(a) (3) of the Act in selecting out union officials for discipline in a wildcat strike situation since union officials cannot be held to a greater degree of accountability for participating in an unlawful strike than rank and file employees.

It is the position of the General Counsel that that is precisely what the Respondent did in this case, single out the union president and vice president for greater discipline because of their participation in what generically could be called a wildcat strike.

JUDGE MILLER: All right. You are then resting your case.

MR. KOFMAN: Yes, General Counsel rests.

JUDGE MILLER: All right.

Mr. Burnstein, are you prepared to proceed.

MR. BURNSTEIN: I am prepared to proceed.

But may we have four or five minutes. I did not an-
[11] ticipate proceeding this early in the day.

JUDGE MILLER: All right.

MR. BURNSTEIN: Thank you.

JUDGE MILLER: I would like, when we do proceed, a very brief statement from you as to how you are going to distinguish your situation from Procession Castings or what it is you anticipate would be your defense. We will take a five minute break.

(A brief recess was taken.)

JUDGE MILLER: Let's go on the record.

Mr. Burnstein.

MR. BURNSTEIN: Yes.

JUDGE MILLER: The ball is in your court and you can give me a short opening statement.

MR. BURNSTEIN: Well, it is the position of Metropolitan Edison Company that the discipline imposed upon Messrs. Lang and Light in this situation was not violative of the Act.

In support of that overall position, Respondent says there are facts and circumstances that may arise in the history of an unprivileged stoppage — and I use the word with some degree of nicety. I want to define it and not label it. That in an unprivileged stoppage, the Company legitimately can inflict a higher degree of punishment upon union officers without transgressing the Act when there are present facts and circumstances in the
[12] dispute itself and in the background of the dispute that gives the Company the right to exercise such a disciplinary action.

Here we are confronted with a collective bargaining agreement that has been construed in the past by arbitrators and whose constructions, we say, have become a part of the body and tissue of the collective bargaining agreement.

And in reliance upon those arbitrable constructions and in light of the specific facts in this dispute

which we will demonstrate to the Administrative Law Judge, we feel the Company's action was entirely proper.

I would note, in my opening statement, that I do not believe that the two Board precedents that I am aware of are on all fours with the facts in the instant case, therefore, while we recognize that they are — they stand as pronouncements of the Board but we do not feel that they necessarily foreclose an opposite result in the facts of this matter.

JUDGE MILLER: Very well.

MR. BURNSTEIN: For my first witness, I would call Mr. Henry L. Robidoux, whom I believe you have already sworn.

JUDGE MILLER: Yes.

MR. BURNSTEIN: Mr. Robidoux.

Whereupon,

HENRY L. ROBIDOUX

was called as a witness by and on behalf of the Re-
[13] spondent and after having first been duly sworn, was examined and testified as follows:

JUDGE MILLER: Will you spell your name for us.

WITNESS: R-o-b-i-d-o-u-x.

MR. KOFMAN: I request to have the witness speak up because it is hard to hear out here.

DIRECT EXAMINATION

BY MR. BURNSTEIN:

Q. Mr. Robidous, would you tell us your position with Metropolitan Edison.

A. I am presently vice president of operations.

Q. How long have you been employed by the company.

A. Twenty-one years.

Q. And how long have you been in the position of vice president.

A. Five years.

[14] Q. What positions have you held with the company prior to your present position.
A. I have been a project engineer, supervisor of engineering, supervisor of constuction and maintenance, operating superintendent, manager of operations, division manager, and my president position of vice president.
Q. How long and in what capacities have you been involved with labor relations activities with the company.
A. I have been involved with the grievance procedures as a department head since 1965 and involved more formally in the third step grievance machinery since 1969. Since taking over this position in 1973, I am responsible for labor relations for the company.
Q. What is the nature of the company's business.
A. We are an electric utility that provides electricity to customers throughout southeastern Pennsylvania, basically from the Pennsylvania/Maryland border down near Gettysburg extending in a northeasterly direction up to the New York border up near Strousburg.
Q. What are the types of customers serviced by the company.
A. We serve all types of residential, commercial, and industrial customers; local, state, and federal authorities; hospitals, all types of agencies like that.
Q. Approximately how many customers would you service.
A. Three hundred thousand customers.
Q. How is the company structured operationally.
A. Our main corporate headquarters is located in Reading, Pennsylvania and we have four operating divisions, headquartered in York, Lebanon, Reading, and Easton, Pennsylvania.
Q. Are the company's employees represented by a labor organization and, if so, what is the structure of the labor organization.

[15] A. Yes, the employees are represented by the International Brotherhood of Electrical Workers and they are organized into five local unions: Local Union 1261 in York; 563 in Middletown; 1482 in Lebanon; 803 in Reading; and 603 in Easton, Pennsylvania.

Q. Now, could you tell us the structure of the collective bargaining relationship with the company.

A. Well, these five local unions have formed together a System Council, U-9, and it is with that system council that the company negotiates its labor agreement.

Q. Approximately how many employees are there.

A. There are twenty-six hundred employees and approximately sixteen hundred of them are represented by the IBEW.

Q. Now, are the IBEW employees represented by a — covered by a single collective bargaining agreement.

A. Yes, they are.

MR. KOFMAN: Your Honor, if I could inquire. It has been stipulated that the strike was a breach of a no strike provision of a valid collective bargaining agreement. Why is it necessary to go into all of the background. We have already stipulated that it is an unlawful strike. I am not sure where Mr. Burnstein is going.

MR. BURNSTEIN: Well, I didn't — before
[16] Your Honor rules, let me point out that a strike in a peanut brittle factory may not rise to the same level as a strike in a nuclear electrical generating system. That is one thing. Secondly, I would think that the reader and tryer of the facts would want to know the background in which the strike took place. We do not feel it is sufficient for the Board's purpose to just say that there was a strike on such and such a date. There is a long involved collective bargaining dispute here and a multi-location unit all of which bear

upon the seriousness of the strike and all of which helps explain the nature of the discipline.

JUDGE MILLER: I am going to permit litigation in this area.

MR. BURNSTEIN: Would you mark these as Respondent's Exhibit 1.

(The above referred to document was marked as Respondent's Exhibit 1 for identification.)

Q. Mr. Robidoux, I show you a document that has been marked as Respondent's Exhibit 1 for identification and ask you to identify that document for us.

A. This is the labor agreement that was in effect at the time of the work stoppage, August of 1977.

Q. That document has since been superceded by a new labor agreement that followed in succession.

A. Yes.

[17] MR. BURNSTEIN: Your Honor, at this time, I would like to offer Respondent's Exhibit 1 for identification into evidence.

MR. KOFMAN: No objection, Your Honor.

JUDGE MILLER: Received.

(The document heretofore marked Respondent's Exhibit 1 for identification was received in evidence.)

Q. Mr. Robidoux, could you tell us what role you personally played in the administration of — or you did play in the administration of Respondent's Exhibit 1 for identification.

A. In this present position, I had been — at the time of this incident, I was hearing third step of the grievance procedure for the company. This is the highest level of grievance procedure before a case goes to arbitration. I have also ruled on those particular grievances and helped in the preparation of the company's case in the event the union decided to take any of those grievances to the fourth step of arbitration.

I have also headed up the negotiations for the periodic negotiations concerning the new labor agreements.

Q. All right, now, could you describe for us the nature of the company's operations in terms of hours per day, days per week, under normal conditions.

A. Well, we provide an essential service in the form
[18] of electric service and is required twenty-four hours a day, seven days a week, uninterrupted.

Q. Now, to your knowledge, have their been incidents prior to August of 1977 wherein members of the bargaining unit have declined or failed to report to work, despite the no strike clause in the contract.

A. Yes, there have been a few.

Q. Have there been a great many such incidents.

A. No, just a few.

Q. Can you tell us what occurred in these instances and particularly what the company did by way of discipline.

MR. KOFMAN: Your Honor, I object. This is getting far afield as to what occurred in August of 1977 and is irrelevant to the position of whether or not it is — the legal question at issue that they gave more severe discipline to union officials than rank and file employees. If they did that five years ago or ten years ago or whatever, it is completely irrelevant to Precision Castings decision and the relevant law in the area. We are just going to burden the record by going far afield.

JUDGE MILLER: I appreciate the nature of your objections, Mr. Kofman. I think, perhaps under the Board law as it stands on this issue, you may be correct. As we discussed earlier, Mr. Burnstein is looking to higher authority and I am permitting him to build a record for that and perhaps to show me
[19] that this case does not fit within the gambit of current Board cases. To that end, I think we will go

somewhat afield in the taking of evidence. I would rather do that than come back here after a remand and start this thing over again. I think we can do this expeditiously. It will, perhaps, burden the record but not so much as it would if it were reheld over your objection.

I will overrule the objection.

Proceed.

Q. Rather than have the young lady waste time, Mr. Robidoux, what I was asking you, as I recall, was: had you had many strikes or violations and you answered, no, not too many. Then I directed your attention to telling us the facts as to those you remember. That is my question right now. Those you specifically remember or know something about, would you tell us about those.

A. Well the ones that I remember are dating back to 1970. There was an incident in Lebanon whereby some employees refused to report to work at their scheduled time and place. As a result of that, the employees involved were disciplined and one of the union officers who at that time was involved received more discipline. I believe, it was three days.

Q. If I said that ninety employees received warnings and the union officer got a one day sus-
[20] pension, would that refresh your recollection. Is that, in fact, what happened.

A. Yes.

Q. All right. Now, following the 1970 incident, can you tell us the next incident that took place.

A. The next incident was in 1972 in our Easton area. Some employees were sent out to do some work at a motel where there was an information picket and they refused to cross that picket line. As a result, we disciplined those employees. The subsequent work day, approximately two hundred employees then, in sympathy with those disciplined employees, failed to report to work at their sched-

uled time and place. Some of those employees were given disciplinary actions and suspensions and warnings — warnings and suspensions.

Q. Now, were these disciplinary actions by the company processed through arbitration.

A. In 1972, yes, they were.

MR. KOFMAN: Your Honor, I would again raise an objection. I think Mr. Burnstein is intending to put into evidence the arbitrator's awards in the 1972 instance.

MR. BURNSTEIN: I would assure you that that is my intention and other awards involving other incidents all going to the role of the union officer in a work stoppage and what the company has been instructed that it may do with propriety under its contract and by well recognized arbitrators.

MR. KOFMAN: Your Honor, the Board, prior to last year, the year before, the Board did refer 8(a)(3)
[21] cases to arbitration. They no longer are doing that and it is clear that the situation like this were the allegation that employees were disciplined because of their union office that what an arbitrator says about it is completely irrelevant to the Board's determination. The Board has taken it back within its own expertise to analyze whether or not that would have a chilling effect upon employee union membership and activities. What an arbitrator said in 1970 or 1972 or any other time is irrelevant. I object to its admission into evidence.

JUDGE MILLER: For the same reasons that I previously stated, I will overrule the objection. The document has not, as yet, been offered but on Respondent's assertion that he will offer it, I will overrule your objection and will receive it. However, let's authenticate it first.

Q. Mr. Robidoux, I show you a document that has been marked as Respondent's Exhibit 2 for identification and the other has been marked as Respon-

dent's Exhibit 3 for identification and ask you if you can identify those documents.

(The above referred to documents were marked as Respondent's Exhibit Numbers 2 and 3 for identification.)

JUDGE MILLER: Mr. Burnstein, when you are addressing the witness and you turn your back, it is very hard to hear you.

MR. BURNSTEIN: Excuse me.

[22] Q. Mr. Robidoux, can you identify the documents I have given you for examination.

A. Exhibit 2 is the arbitration dealing with the discipline given these employees who failed to cross the informational picket line and also those employees who engaged in the unlawful work stoppage on April 20, 1972.

Exhibit 3 is the arbitration dealing with the three day disciplinary suspension given to the officers who were involved with the April 20, 1972 incident.

MR. BURNSTEIN: Your Honor, I would like to offer Respondent's Exhibits 2 and 3 at this time.

JUDGE MILLER: Noting General Counsel's overruled objection, they are received.

MR. BURNSTEIN: Your Honor, I proposed to have the witness call attention to testimony, specific portions of the awards that we rely on but I think that is a redundancy and we will not have the witness read the portions and I think it will just as well serve our purpose by pointing them out to you in our brief by way of argument.

JUDGE MILLER: That would be fine as long as General Counsel knows what you are referring to so that he may brief to that point if he wishes.

MR. RUBENSTEIN: Let me state to General Counsel, rather than ask the witness to read paragraphs, you will find language that I rely on in both

[23] awards dealing with the position the union official is

expected to take or fails to take at his peril by both arbitrators in the awards and that is the purpose really of putting them into evidence at this time.

Q. Now, Mr. Robidoux, I would direct your attention to 1972 and ask you if you had a work stoppage and if so, if you could tell us about the facts in that work stoppage.

A. 1973.

Q. I stand corrected. 1973.

A. The next incident was in 1973 and involved the same site as this particular case, Three Mile Island Nuclear Generating Plant. In that instance, the entire local union participated in approximately a three day work stoppage, in violation of our labor agreement.

Q. What, if any, discipline was accorded to the employees in that stoppage.

A. The employees who participated in that work stoppage were all given disciplinary suspension of five days but later we only administered one day of and the officers who were involved and participated — who participated and who were involved were given a twenty-five day suspension but we only administered five days of that suspension.

Q. Will you tell us the names of the officers who were involved in that 1973 incident.

A. Two of them were officers that are present today, that is, Mr. David Lang and Mr. Gene Light.

[24] Q. The discipline that you gave out in relation to that 1973 incident, was that taken to arbitration, to your knowledge.

MR. KOFMAN: I object to any inferrence that might be drawn from failure of the union to take this discipline to arbitration. I mean, it is completely irrelevant.

JUDGE MILLER: I will not make any inferrence from their failure to go to arbitration, if such were the case.

You may answer the question.
A. Yes, they did take two grievances to arbitration resulting from that work stoppage.
Q. Was the discipline accorded to Mr. Lang and Mr. Light taken to arbitration.
A. No.

MR. BURNSTEIN: Will you mark this as Respondent's Exhibit No. 4 and 5.

(The above referred to documents were marked as Respondent's Exhibits No. 4 and 5 for identification.)

Q. Mr. Robidoux, I show you two documents marked as Respondent's Exhibits 4 and 5 for identification and ask if you can identify those documents.
A. Document 4 is a disciplinary action given to Mr. Lang for his participation in the October 31st, 1973 work stoppage.

Document 5 is the disciplinary suspension
[25] given to Mr. Light.
Q. Do those documents explain the basis upon which the discipline is given to Messrs. Lang and Light.
A. Yes, it does.
Q. And that explanation is in the body of each of those documents.
A. Yes.

MR. BURNSTEIN: At this time I would like to offer Respondent's Exhibits 4 and 5 into evidence.

MR. KOFMAN: I would like to look at them first.

MR. BURNSTEIN: I am sorry.

(The above referred to documents were shown to the General Counsel.)

MR. KOFMAN: I have no objection.

JUDGE MILLER: May I see.

MR. BURNSTEIN: Yes.

JUDGE MILLER: They will be received.

(The above referred to documents, marked as Respondent's 4 and 5 for identification were received in evidence.)

Q. Now, subsequent to this October 1973 incident, were there any additional strike situations in the bargaining unit.

A. There was one additional situation in 1974 at our Portland Generating Station up in our Easton Division.

Q. What, if any, discipline was given to the employ-
[26] ees and the union officials in that situation.

A. Some of the employees involved there had never participated before in a work stoppage and were given a disciplinary warning. Those that had participated before were given disciplinary suspensions. Three of the stewards who participated and who were involved were given disciplinary suspensions of, I believe, five days.

Q. All right. Now, was that disciplinary action taken to arbitration.

A. Yes.

Q. Now, was the disciplinary action given to the stewards in that case sustained.

A. Well, the arbitrator found from the evidence presented to him that in the case of one steward, he did sustain the company's position. In the case of the other two stewards, he felt the evidence did not substantiate the additional discipline and their discipline was reduced to the discipline of the other employees.

MR. KOFMAN: Your Honor, I would like to see at least a copy of that award to find out what grounds the discipline was upheld as to the one steward.

JUDGE MILLER: I would prefer it to the witness's recollection as to what the outcome was.

MR. KOFMAN: But, I —

MR. BURNSTEIN: I will be guided by your

instructions, Your Honor, I have copies of the award.

[27] JUDGE MILLER: I would rather have the award.

MR. BURNSTEIN: Will you mark this as Respondent's Exhibit 6.

(The above referred to document was marked as Respondent's Exhibit No. 6 for identification.)

Q. Mr. Robidoux, I show you a document that has been marked as Respondent's Exhibit 6 for identification and ask you if you will tell us what it is.

A. This is the award and opinion of the arbitrator in the 1974 incident at Portland Station.

Q. This is the one dealing with the special discipline given the union stewards as a result of a work stoppage which you recanted to us previously.

A. Yes.

MR. BURNSTEIN: At this time, Your Honor, I would offer Respondent's Exhibit 6 into evidence.

MR. KOFMAN: My objection is the same as before.

JUDGE MILLER: You have a standing objection to this entire line of testimony.

Repondent's Exhibit 6 is received.

(The document previously marked as Respondent's 6 for identification was received in evidence.)

MR. KOFMAN: Your, Honor, if I may at this point, as to Respondent's Exhibits 4 and 5, the disciplinary warnings issued in 1973, I was wondering if

[28] Respondent also gave out disciplinary warnings to other union officials and if they did, I wish they would be produced at this time as part of whole series rather than being taken out of context.

JUDGE MILLER: You may request it now or you may ask on cross examination.

MR. BURNSTEIN: I think you should read the awards. The question you are posing is answered therein, but you can ask on cross examina-

tion and I assure you that if there is any material you want additionally, I will be more than happy to cooperate.

Q. I would again like to direct your attention to Three Mile Island and the stoppage of October 1973. In that instance, both Lang and Light received additional discipline for failure to properly act as union officers. Is that correct.

A. Yes.

Q. Insofar as the company is concerned, has that discipline stood unchallenged on the record until this time.

A. Yes.

Q. Now, between 1974 and 1977, August of 1977, was there any additional work stoppages at the Three Mile Island facility by this bargaining unit.

A. No.

Q. When was the first such incident that occurred after 1973.

[29] A. On August 4th, 1977.

Q. Now, before you go into the August 4 incident, can you tell me the facts about Three Mile Island. What is it. What does it constitute, who owns and operates it. What does it do and how many employees are involved.

A. Three Mile Island is an island in the Susquehanna River just south of Harrisburg, Pennsylvania, and it is the site of a two unit nuclear generating station that is operated by Metropolitan Edison Company. But Metropolitan Edison Company only owns fifty percent share of each of the two units. The other fifty percent share are owned by our sister companies in the general public utilities, namely, Pennsylvania Electric Company and Jersey Central Power and Light Company.

The two units generate approximately 1,700,000 kilowatts of electricity when they are completed at a cost of slightly over a billion dollars.

Construction started on this site in 1968 and the first unit went commercial in the fall of 1974. The second unit is presently planned to go into commercial operation in the fall of 1978.

We have approximately five hundred sixteen employees on the island, three hundred of which are represented by the International Brotherhood of Electrical Workers. The contract to construct the unit is handled by another operating entity of General Public Utilities, the General Public Utilities [30] Service Company. In turn, they have hired a major contractor to do the construction of the two units. At the peak of construciton of both units, there were approximately three thousand to thirty-five hundred employees of various building trades unions who were also on the island engaged in the construction of the general contractor under contract to General Public Utility Services Company.

Q. All right, now, prior to August 1977, had there been other labor disputes at Three Mile Island involving employees that did not work for Metropolitan Edison.

A. There may have been a few but none that involved our employees.

Q. Did these disputes interfere with Metropolitan Edison's operation.

A. No, they did not.

Q. Can you explain to us how your operations — why your operations have been relatively free from interruptions.

MR. KOFMAN: Your Honor, I object. I do not see the relevancy at all.

JUDGE MILLER: I think I can see the relevancy. I am not sure the question can be answered without going into speculation and opinion.

MR. BURNSTEIN: Well, let me say this, Your Honor, access to the island is controlled by two entrances, north gate and south gate. I am trying to ascertain from the witness —

[31] JUDGE MILLER: You are asking for physical facts rather than opinion.

MR. BURNSTEIN: Well, and what arrangements had been made with reference to what groups of employees. What takes place on August 30 becomes meaningful in terms of who was using what gate, at what time, and why.

JUDGE MILLER: Very well. The objection is overruled. You may answer.

A. Access to the site, because it is an island, is by two means. There is a permanent bridge at the north end of the island. That bridge is basically used by our employees and employees of contractors who work for us under maintenance agreements or under different types of agreement.

The south bridge is a temporary bridge used by the construction forces that are engaged in the construction of the units by the general contractor.

Q. Prior to August 1977, which classes and types of employees utilized which gate.

A. Well, the contractor's personnel basically used the south bridge, south gate, and our employees and employees of maintenance contractors that we had engaged used the north gate.

Q. All right, now, what happened in August 1977 in reference to your IBEW bargaining unit employees.

[32] A. Well, on August 4th, early in the morning, a picket line was established by one of the building trades unions and the majority of our employees who were scheduled to report that morning failed to cross the picket line and assembled at what we call an observation center on the mainland just east of the island site.

Q. What, if anything, did the company do as a result of this incident on August 4th.

A. The employees, upon direction of the company, finally reported to work at about 9:00 o'clock that

morning. We reviewed the circumstances behind the failure to report at the scheduled and place and looked at each individual and those that did report were given no discipline. Those that reported later in the day were given a disciplinary warning. There were some employees who failed to report at all. Those employees who had never participated in an unlawful work stoppage before were given three days which was later reduced to one. The employees who had been engaged in an illegal work stoppage before were given ten days, reduced to two.

Q. Was all of this discipline given pursuant to written formal documents.

A. Absolutely.

Q. Now, did Mr. Lang or Mr. Light receive any punishment or discipline as a result of the August 4 incident.

[33] A. No, they did not.

Q. Now, following the August 4 incident, were there any meetings between the union and the company concerning that incident.

A. Yes, there was some confusion that arose out of the August 4th incident and confusion as to what, perhaps, the employees were to do in case a picket line were established at the north gate. So we took special pains to make sure that employees and the officers involved knew their responsibility under our labor agreement. That began with a meeting of the local union officials of the units who attended on the same day, August 4th.

Q. Who would they have met with on that date.

A. I believe it basically members of the executive board of the local union.

Q. And who for the company.

A. The unit superintendent.

Q. Who would that be.

A. Mr. Gary Miller.

Q. Thereafter, were there any additional meetings, to your knowledge.

A. Yes, on August 12th, I and the vice president of generation, Mr. Herbine, specifically met with Mr. Light and Mr. Lang who were the president and vice president of the local.

[34] Q. Would you tell me what took place during that meeting.

A. Well, at that meeting, we reviewed some of the facts and circumstances behind the August 4th incident and I believe that I and Mr. Herbine made it absolutely clear to Mr. Lang and Mr. Light at that time what was expected of them as officers of the union, what was expected of them under the terms of our labor agreement with the Systems Council.

Q. Would you tell me exactly what you said to them, as best you remember.

A. As I can best remember, we said it was their absolute obligation to have their employees report to work at their scheduled time and place. And that they were not to go to the observation center and it was their duty as officers to especially make sure that they uphold the labor agreement and affirmatively act, if necessary, to show the rest of the employees what their obligations were under our labor agreement.

Q. Is that the best you can remember the content of the August 12th meeting.

A. Yes.

Q. Now, thereafter were there any additional meetings.

A. On August 26th in a meeting with the Systems Council, Mr. Lang, at that time, made a comment
[35] that he thought, perhaps, there may have been some rumors of some more picket lines up at Three Mile Island and he made a remark that if that happened, he would not cross any picket line.

I very promptly let him know that it was his obligation, and the obligation of all employees, to cross the picket line.

Q. Was the company's position regarding the obligation to report to work individually made known to the members of the bargaining unit, aside from the discussion with Messrs. Lang and Light.

A. Yes.

Q. How was that done.

A. Basically through the interviews that we had with those employees, the disciplinary action that resulted as of the August 4, 1977 incident.

Q. Now, can you tell us what took place at Three Mile Island on August 30, 1977.

A. On August 30, 1977, again in the early morning hours, a picket line of a different building trades union was established at the north bridge and, again, a large number of employees who were scheduled to report that morning failed to report to work.

Q. Did the employees report to work as scheduled later in that day.

[36] A. Yes, at approximately 11:00 or 11:30.

Q. Now, as a result of that, I believe you issued the following discipline: Messrs. Lang and Light received twenty-five days suspension.

A. That is correct.

Q. And fourteen employees received ten day suspensions.

A. Yes.

Q. And one hundred twenty-one received five day suspensions.

A. Correct.

Q. Now, what has been the union's position with reference to these disciplinary actions.

A. It was taken through the grievance machinery and presently are pending arbitration.

Q. The arbitration of such is scheduled to commence on August 2nd of 1978.

A. Yes.

Q. Now, who made the decision concerning the various types of discipline that were imposed after the August 30th incident.

A. I did after consultation with others in the company and after review of all of the facts.

Q. Can you tell us the basis for the discipline you gave out to the various classes of employees, including Mr. Lang and Mr. Light.

[37] A. For the August 30th incident.

Q. Yes.

A. We reviewed all of the facts. Each individual employee was interviewed — and there were, I believe, one hundred thirty-eight employees involved. After gaining all of those facts and looking over the circumstances and, again, as I say, in consultation with officials at the Island site and with others back in the Reading office, particularly in reviewing Mr. Lang and Mr. Light's prior record and consultations with them on August 4th, August 12th, and our statement of August 26th, and the fact that they had received a twenty-five day suspension prior to this, it was decided to give them the twenty-five day suspension and administer the full twenty-five days.

Mr. BURNSTEIN: I have no further questions at this time.

JUDGE MILLER: Mr. Kofman.

MR. KOFMAN: Could I have about two minutes to look at my notes.

JUDGE MILLER: You sure can. Off the record.

(A brief recess was taken.)

JUDGE MILLER: Back on the record.

CROSS EXAMINATION

BY MR. KOFMAN:

Q. Mr. Robidoux, I think you testified on direct that all of the employees were informed between August
[38] 4 and prior to August 30th of what their obligations would be in case there was another picket line at the north gate. Is that correct.

A. Yes, Sir.

Q. I think you testified through consultation, interviewing, the interviewing of individual employees by the supervisors.

A. When the disciplinary actions were handed out.

Q. Was there any general meeting of employees called together and informed of what their obligations were.

A. No, we felt that telling the union officials that it was their responsibility to communicate to their members what those responsibilities were.

Q. Okay, but it is true that the company failed to contact half, if not more, of the bargaining unit employees between August 4th and August 30th as to what their obligations were.

A. We felt there was no need to. We felt —

Q. Just answer my question. It is true that you did not contact at least half, if not more, unit employees between August 4 and prior to the August 30th work stoppage.

A. I think we contacted more than half of the employees who were involved in that incident.

Q. But weren't there employees on vacation.

A. Yes, and there were employees who were on
[39] other shifts —

Q. My question, Mr. Robidoux, and you did not answer my question which was very simple. It is a fact that half, if not more, of the bargaining unit employees were not notified of what their obligations were by the company between August 4 and August 30. That is correct.

A. I think the margin you gave, fifty-percent, I do't think that is correct.

Q. Well, is it close to half.

A. It was more than half of the those employees who were involved in the incident and were given warnings. Those were the ones who needed, I think you are implying, some direction because they did not know what their obligations were.

JUDGE MILLER: Don't concern yourself with what he is implying. Just answer the question. I think the question can be answered yes or no.

MR. KOFMAN: Yes, I would appreciate the answer. The question is again: of the bargaining unit employees, the company only contacted half, or perhaps less than half, between August 4 and August 30 and informed them of what the company considered to be their obligations if a picket line were to go up at the north gate.

A. Yes.

Q. I think you also testified that prior to August 4
[40] that the north gate was used by Metropolitan Edison employees and the south gate was used by employees of the construction contractor.

A. That is correct.

Q. But it is true that prior to August 4 and right through August 30 that employees of sub-contractors of the construction unions did, indeed, go through the north gate as well as the south gate.

A. I believe I did testify that the employees of the maintenance contractor did go through the north gate along with our employees.

Q. They did, right up through August 30.

A. In fact, beginning early in 1973 they were doing it.

MR. KOFMAN: Again, Your Honor, could the witness be instructed —

JUDGE MILLER:No, I think that answer is responsive to the question.

Q. Just to make sure I have it in my mind. It was not an exclusive gate for Metropolitan employees as of August 30.

A. Absolutely not.

Q. Thank you.

Now, it is also true that Light and Lang were not disciplined for the August 4 work stoppage. Is that correct.

[41] A. That is correct.

Q. And it is also true that Light and Lang participated in the work stoppage to the extent that they did not report for work at the scheduled time, work time, on the morning of August 4th.

A. That is right. But they —

Q. That is enough of an answer. Just answer the questions and I would appreciate it.

MR. BURNSTEIN: That is all right. I will pick it up.

JUDGE MILLER: I expect you will.

Q. I think you also testified that there was no work stoppage at the Three Mile Island plant between 1973 and 1977 that affected the IBEW unit.

A. Yes.

Q. Are you aware that there was a work stoppage, another picket line situation, at a sub-station in 1976 that involved IBEW employees.

A. I heard of it but I am not familiar with the circumstances.

Q. You are not familiar with it.

A. No.

Q. But you do know that it was not at the Three Mile Island plant but it did involve IBEW employees.

A. From what I know about it, it was some type of

[42] picket line up at the sub-station near our Three Mile Island sub-station site. I think that prevented the entrance of some of our employees to that sub-station.

Q. The employees who were members of the Three Mile Island facility.
A. Yes.
Q. Do you know if there was any discipline taken against those employees.
A. No, there was not.
Q. I think you also testified as to Respondent's Exhibits 4 and 5, disciplinary warnings given to Lang and Light in 1973. Were there other similar warnings given to other union officials at that time.
A. Yes, there were several other union officials that were members of the executive board that were given the same letters of discipline.
Q. They were all given the same discipline.
A. Yes, sir.
Q. And to save time, were they worded identically to what is on Respondent's Exhibits pertaining to Light and Lang.
A. Yes.
Q. How many people were involved approximately.
A. There were about eight.
Q. Mr. Robidoux, it is true that on or about September 8th, that you summoned Mr. Light and Mr.
[43] Lang to a meeting with you and Mr. Herbine in Reading to be counseled about their participation in the August 30 work stoppage.
A. My recollection is September 9th.
Q. Sometime in that area.
A. Yes.
Q. Isn't it true that you said something to them in effect that you were upset with them for not crossing the picket line because as union officials you felt that they had a duty to do it and that was the reason they were being disciplined. Is that statement substantially correct.
A. Yes.
Q. Didn't you also emphasize to them at that meeting that you felt they were strong leaders and that

you personally felt that if they crossed the picket line that the other employees would follow them.
A. Yes.
Q. Mr. Robidoux, there was a third step grievance hearing on September 27th. Do you remember that.
A. (No response.)
Q. That was growing out of the August 4th work stoppage on or about September 27th.
A. September 27th.
Q. 1977.
A. Yes.
[44] Q. At that meeting you expressed surprise and did not know that Light and Lang had not been disciplined for the August 4th work stoppage.
A. Not to my recollection, no, because I was involved in the discipline of the August 4th work stoppage.
Q. Didn't you make a statement at that grievance meeting that you did not — that you were not aware as of September 27th that Light and Lang had not received any discipline in the August 4 work stoppage.
A. Absolutely not, not to my knowledge.
Q. You testified that the employees reported to work on August 4th and the direction of the company at 9:00 a.m.
A. Yes.
Q. Isn't it true that at the time the employees reported to work, the picket line had left or was leaving at the time the employees reported to work.
A. No, sir, there were pickets there until 2:30 that day.
Q. How many pickets.
A. A handful of pickets.
Q. Okay. At the north gate.
A. Yes.
Q. How many pickets were there at the north gate at, say, 7:00 or 7:30 that morning.
A. August 4th.

[45] Q. August 4th.

A. My recollection is that there were, I don't know, fifty to seventy-five.

MR. KOFMAN: That is all the questions I have.

REDIRECT EXAMINATION

BY MR. BURNSTEIN:

Q. Mr. Robidoux, you started to explain why Messrs. Lang and Light had not received any discipline on August 4th for the August 4th, 1977 incident. Would you complete your explanation and tell us what actually happened with reference to that incident, relative to them.

A. Yes, they did not receive any discipline because they and a substantial number of employees did report to work at 9:00 o'clock when so directed by the company. As a matter of fact, we paid them for their normal working day that day. So that they received no discipline nor did any of the employees receive that followed those orders at 9:00 o'clock.

MR. BURNSTEIN: No further questions.

MR. KOFMAN: One moment please.

RECROSS EXAMINATION

BY MR. KOFMAN:

Q. Mr. Robidoux, the August 4th work stoppage, isn't it true that a lot of the non-bargaining employees, including supervisors and managerial employ-

[46] ees, also reported to the observation center at 7:00, 7:30, the time they were supposed to report for work.

A. Yes, some did.

Q. And that those people, or at least a number of those people, did not cross the picket line until approximately 9:00 o'clock themselves.

A. Yes.

MR. KOFMAN: I have no further questions, Your Honor.

MR. BURNSTEIN: I have nothing further.

JUDGE MILLER: Thank you, Mr. Robidoux, you may step down.

(Witness excused.)

JUDGE MILLER: Let's go off the record a minute.

(Discussion off the record.)

JUDGE MILLER: Back on the record.

We will take a lunch break now. It is quarter of 1:00 and we will recess until 1:30.

(Whereupon at 12:45 o'clock p.m. a luncheon recess was taken until 1:30 o'clock p.m.)

[47] AFTERNOON SESSION

(1:30 p.m.)

JUDGE MILLER: Let's go back on the record.

MR. BURNSTEIN: Your Honor, I would briefly like the opportunity to recall Mr. Robidoux. He has reflected on one answer he made to the Counsel to the General Counsel and would feel more comfortable clarifying his answer if there are no objections.

JUDGE MILLER: He may resume the stand.

Whereupon,

HENRY L. ROBIDOUX

having been previously sworn, resumed the stand, and was examined and testified as follows:

BY MR. BURNSTEIN:

Q. Mr. Robidoux —

JUDGE MILLER: You are still under oath, Mr. Robidoux.

Q. Mr. Robidoux, I believe you were asked on cross examination as to a grievance meeting held approximately September 27th, 1977, concerning — I

think the subject was concerning the discipline of Mr. Lang and Mr. Light relative to the August 4 work stoppage. You had answered the General Counsel and you indicated to me that you would like to amplify further on that answer. Will you please do so.

A. I think I was asked whether I was surprised that they had not received discipline and I think my an-
[48] swer this morning was that no, I had not expressed surprise. Upon reflection, I remember now that we were considering at that time discipline for all employees who were involved with the August 4th incident. I remember now, reflecting back on that meeting, that I was surprised that they, along with the other employees who reported at 9:00 o'clock had not received some disciplinary warning. In fact, they did not. The employees who reported at 9:00 o'clock received no disciplinary warnings. Upon reflection, my answer was incorrect.

JUDGE MILLER: May I just ask, Mr. Robidoux, the disciplinary letters of Mr. Lang and Mr. Light, dated September 9th, for the August 30th work stoppage, did you then consider that they had been disciplined on the August 4th work stoppage and that was part of their overall record that you testified to that you considered in giving them the twenty-five day suspension.

WITNESS: No, we were really looking at the 1973 participation and their direct involvement in the August 30th situation.

CROSS EXAMINATION

BY MR. KOFMAN:

Q. So August 4th played no role is what you are saying.

[49] A. August 4 did play a role in other people's disciplinary warnings and suspensions that were issued

after the August 30 work stoppage. Is that correct.
A. Yes, that is correct.
Q. But it played no role whatsoever in Mr. Lang or Mr. Light's suspension.
A. Correct.

MR. KOFMAN: Thank you.

I have no further questions.

MR. BURNSTEIN: I have no further questions.

JUDGE MILLER: Thank you, Mr. Robidoux, you can step down.

(Witness excused.)

MR. BURNSTEIN: Mr. Hombach.

Whereupon,

THOMAS L. HOMBACH

was called as a witness by and on behalf of the Respondent and after having first been duly sworn, was examined and testified as follows:

BY MR. BURNSTEIN:

Q. Mr. Hombach, would you state you full name for the record, please.
A. Thomas L. Hombach, H-o-m-b-a-c-h. I am the director of division personnel, Metropolitan Edison.
Q. What is the nature of your job duties and responsibilities.

[50] A. My job duties include personnel administration and labor relations for the Lebanon Division which includes Three Mile Island.
Q. What are your duties in relation to Local 563.
A. Local 563 are employees of Three Mile Island.
Q. How did you become involved in the problem of August 30 at Three Mile Island.
A. I was first notified that there was a group of pickets assembled at north bridge at Three Mile Island at approximately 6:45 that morning. At that point, I went to my office in Lebanon which is about

twenty-five miles from Three Mile Island. I notified the appropriate personnel in the Lebanon Division.

At that point, I left my office and went direct to the Local 563 Union Hall located in Middletown.

Q. Why did you go to the union.

A. Well, there was a common rumor that everyone seemed to know about throughout Three Mile Island that if another picket line occurred at north bridge that employees, rather than trying to report for work or going to the observation center, would report to the union hall.

Q. Now, prior to August 30, had you had any meetings with the officials of Local 563 concerning the picket lines.

A. Several days after the August 4th incident, I was in a discussion with Mr. Light, the vice president of
[51] the union at that time and two other union officials, Johnny Cody and Mike Janowski. This meeting was held to discuss how we were going to implement employee interviews as a result of August 4th. During that meeting, the meeting was interrupted by an employee saying, I understand the union has voted to not cross the picket line if it is formed again and instead of attempting to cross the picket line, that employees are to report to the union hall.

When we were told about that, we immediately confronted the union whether that was true or not true. They neither admitted nor denied that. I said, if that is true, however, please whatever you do, do not report to the union hall. Tell your members not to report to the union hall but to make an attempt to cross the picket line and if they are — if there is violence demonstrated in any way, that there would be a company representative to direct them elsewhere but they must first attempt to cross the picket line. If they do not and report to the union hall, most certainly it would be considered a work stoppage.

Q. Now, to whom exactly did you communicate this statement you just made.
A. To Mr. Light. To Mr. Cody. And to Mr. Janowski.
Q. And this was at a meeting held by you with them.
A. That is correct.
Q. Approximately when in August would that have
[52] taken place.
A. August 8th, four days after the August 4th incident.
Q. Mr. Lang was not present at that meeting.
A. No, as I recall, he was on vacation at that period.
Q. Now, returning to August 30, I believe you had just testified that you went to the union hall some time early in the morning.
A. That is correct.
Q. Could you tell us at what time you arrived at the union hall.
A. I arrived there approximately 8:00 a.m.
Q. What was taking place there when you arrived.
A. When I arrived there was in excess of one hundred employees milling in and about the union hall. I asked one of them if David Lang was there and they said he was and I asked if I could talk to him and David Lang came out of the building and sat in my car with me and we talked.
Q. Will you tell us what he said and what you said in that conversation.
A. Yes, I said to him that he should be trying to report to work and ask the members to follow him.

He said they were not going to report for work until the company removed the pickets.

Q. What response did you make to that statement.
[53] A. I again said, you know you are not supposed to take that position. You are supposed to attempt to report for work and I again urged him to do so.

He responded by saying something to the effect that if he were to cross this picket line, certainly in

1978 if their union went on strike the pickets certainly would not honor their picket line.

I again urged him to report to work and having his people follow him and again there was no response.

Q. Approximately how long did this conversation take place.

A. Just a matter of about ten minutes.

Q. Was there anybody else present.

A. Not that I remember.

Q. Now, upon completion of the conversation, what did you do next.

A. I then proceeded to Three Mile Island, which was about three miles away. When I got there, I saw that there was less than ten pickets. There was no picket line. There were just a number of pickets standing and talking. I met Walter Poyck there and I asked him to return to the union hall again with me to again talk with the union officials about the picket line situation.

Q. Would you identify Mr. Poyck for us. Tell us what position he holds.

[54] A. At that particular time he was — his title was coordinator of services on Three Mile Island.

Q. He was not a member of the bargaining unit.

A. No, he was not.

Q. All right, now, I believe you stated that you were going back to the union hall.

A. Yes.

Q. Did you go back to the union hall.

A. Yes, Mr. Poyck and I returned to the union hall.

Q. At approximately what time.

A. We got there about 8:30.

Q. What was taking place there. What did you do or say.

A. The same conditions existed with the number of employees as it was about 8:00 o'clock. Mr. Poyck and I talked with David Lang and Gene Light at this

point. I informed them of the picket situation and told them that there was less than ten pickets. There was certainly no line. There was no cause for concern because they were not in any way attempting to block anybody from entering Three Mile Island.

I said that on August 4th, the employees went to the union hall and refused to cross the picket line — went to the observation center and refused to cross the picket line because, in their opinion, they
[55] were afraid of bodily harm if they would cross the pickets. I said now, there is less than ten pickets and they are not attempting to block anybody and certainly fear of bodily harm should not be a concern.

David Lang stated that — stated something to the effect that, well, the employees could change their mind. I said, it is your obligation to report to work. Please do so. I am sure if you do so, your members will follow you.

Q. Did Mr. Lang make any response.

A. He said that they would report to work when the company removes the pickets.

Q. Mr. Light was present at this conversation.

A. Yes.

Q. Did Mr. Light participate in that interview.

A. He did not participate, that I know of, in any discussion at that point.

Q. What about Mr. Poyck.

A. Not that I recall.

Q. Now, where physically did this conversation take place.

A. This conversation took place outside the union hall in the vicinity of a number of other union members.

Q. Were these other union where they could overhear this conversation.

MR. KOFMAN: I object, Your Honor.

MR. BURNSTEIN: I will rephrase the question.

Q. How close were you to other members of the
[56] union when the conversation took place.

A. They were as close to me as Mr. Lang and Light.

Q. Well, how close was that.

A. About a couple of feet.

Q. Approximately how many other union members would have been that close to the conversation.

A. Gee, I don't know. As I said, there was in the neighborhood of a hundred people milling in and about the union hall and how many could hear, I do not know.

Q. Now, at the conclusion of this conversation, what did you do.

A. At the conclusion of that conversation, I went back to Three Mile Island, north gate.

Q. Approximately what time of the day was that.

A. In the neighborhood of about 9:00 a.m.

Q. What was taking place, if anything, at the north gate at that time.

A. Well, the number of pickets had not changed and there was no activity other than people going across, back and forth, going across the line.

Q. Did you do or say anything at that time at the north gate.

A. No, I did not.

Q. Did you observe any of the union officers at the north gate at that time.

[57] A. Well, not until about 10:00 a.m.

Q. Tell us what took place at 10:00 a.m.

A. At approximately 10:00 a.m., I saw Mr. Light and another union member approach the pickets and they had a discussion with the pickets and then when their conversation was complete, I asked to — I called him over to talk to him. I again urged him to report for work, to come to work as soon as possible as the situation was setting worse. They said they

were trying to get the pickets removed. Again, I said that does not matter. Come to work now.

Q. When you say they, identify who the they is, if you would in these remarks.

A. Well, the remark was made by Mr. Light who was attempting at that point to get the pickets removed.

Q. Now, What did Mr. Light do at the end of that conversation.

A. Got in his truck and went toward Middletown.

Q. Now, what did you do next.

A. I remained at the north bridge at the entrance to the island until approximately 11:00 a.m. at which point I went back to the union hall because I understood that there was some discussions going on relative to the company having the pickets removed and I felt very strongly that, you know, I must make it known to the union that regardless of what is going
[58] on, it does not negate their obligations to report to work. So I went back to the union hall for that purpose.

Q. Did you talk to anybody at the union hall.

A. Well, I arrived there and Mr. Light and Mr. Lang — Mr. Lang was there. I don't remember if Mr. Light was there at that time. Through conversations, Mr. Lang said that he was waiting on a call from Mr. Miller who was the plant superintendent telling him that the pickets had been moved.

I said, you know, that does not matter. You know you should report to work now.

At that instant an employee came out of the union hall and said that the plant operators were being released from duty and if that was the case, that certainly was an effort on the part of the company for a lock out and I immediately went into the union hall and made a phone call. There was confusion there and that situation was averted. At that point, in that discussion. I talked with Mr. Miller.

Mr. Miller said that I would be calling you back in a couple of minutes with a statement to be read to Mr. Lang. A couple of minutes later, he called back and I reported the statement that Mr. Miller read to me over the phone and then gave it to Mr. Lang.

MR. BURNSTEIN: Mark this as Respondent's 7.

(The above referred to document was marked as Respondent's Exhibit No. 7 for identification).

[59] Q. I show you a document that has been marked as Respondent's Exhibit 7 for identification. Will you tell us what this document is.

A. That is the message that I read and gave to David Lang.

Q. This was at what time, sometime around 11:00 o'clock.

A. Yes, sir.

MR. BURNSTEIN: I would like to offer Respondent's Exhibit No. 7 in evidence at this time. With the clarification that it is only as to the text that appears therein as being the statement that the witness took down and read and gave to David Lang. The balance of the information in there is not evidentury.

MR. KOFMAN: I would just note for the record that is a typed copy. I have the handwritten copy that Mr. Hombach gave to Mr. Lang but I have no objection to that going into evidence as that is substantially what that handwritten message said.

JUDGE MILLER: Very well, I will receive it in the typed form.

Q. Insofar as the events of August 30, 1977, did you play any other role, other than that you have told us up to this point.

A. No.

[60] MR. BURNSTEIN: I have no further questions.

JUDGE MILLER: You may cross examine the witness.

MR. KOFMAN: May I have two or three minutes to look over my notes.

JUDGE MILLER: Yes, we will take a five minute break.

MR. KOFMAN: Thank you.

(A brief recess was taken.)

JUDGE MILLER: Let's go back on the record.

CROSS EXAMINATION

BY MR. KOFMAN:

Q. Mr. Hombach, to clarify the record, you said that you were, at 10:30 or 11:00 o'clock at the union hall speaking with Mr. Lang and at some point someone came out and said the operators were being run off the plant. Could you just amplify that. Exactly what was happening.

A. Well, I am not qualified to give the whole story behind that, okay, but operators at Three Mile Island, control room operators, there is a plant rule which says that control room operators should not stay on the job for longer than twelve hours. Okay. The people that were working 11:00 to 7:00 that night were supposed to quit at 7:00 o'clock and of course, were not relieved from duty, the bargaining unit employees, and by 11:00 o'clock that morning their twelve hours were up. Okay. I don't know how the word was communicated to the control room op-
[61] erators or how that evolved but at the end of the twelve hours, everybody thought the control room operators were going to be required to leave the plant and the plant would then be operated by salaried employees.

In my discussion with Mr. Miller, the station superintendent that was averted and the bargaining employees remained on duty.

Q. In other words, the replacement people, the next shift for those people were honoring the picket line and if they had left, you felt there might be a problem with a lock or something.

A. That is right.

Q. Okay. I just wanted to clarify that.

At 10:00 a..m., around 10:00 a.m. you testified Light came down to the picket line.

A. Yes.

Q. And you had a conversation with him.

A. Yes.

Q. In that conversation, you emphasized that Light and Lang would be in big trouble if they did not cross the picket line. Is that correct.

A. Well, I can't say that I said to him, Light and Lang are going to be in big trouble. I said, it was getting worse as far as you are concerned. If I remember my words, as best I can.

[62] Q. Okay. And as far as you were concerned, you met Mr. Light.

A. Because Mr. Light was the only one of Light and Lang there at the time.

Q. And there was no other employee in the conversation you had with Mr. Light at 10:00 a.m. rank and file.

A. Mr. Paul Welsh.

Q. Was he standing there with Mr. Light or was he away from the conversation.

A. I remember he was standing right next to him.

Q. You did not say that he was in trouble, too.

A. I did not but the whole inference was the union was in trouble and Mr. Light being the one we had been addressing, certainly I meant it as far as he was concerned because he was a union official.

Q. Okay.

MR. KOFMAN: I have no further questions, Your Honor.

MR. BURNSTEIN: Nothing further.

JUDGE MILLER: I just have a couple of questions.

EXAMINATION

BY JUDGE MILLER:

Q. The August 30 picketing was by one of the construction unions.

A. Well, in the two picketing instances, I do not feel that I am qualified to say who the pickets were and
[63] why they were picketing because I was never totally involved with that type of thing.

Q. You do not know which union it was.

A. No, it really made no difference as far as I was concerned.

Q. All right. Thank you.

JUDGE MILLER: You may step down.

(Witness excused.)

MR. BURNSTEIN: Mr. Poyck.

Whereupon, WALTER S. POYCK was called as a witness by and on behalf of the Respondent and after having first been duly sworn, was examined and testified as follows:

JUDGE MILLER: Please be seated. State your name and spell it for us.

WITNESS: Walter S. Poyck, P-o-y-c-k.

DIRECT EXAMINATION

BY MR. BURNSTEIN:

Q. Mr. Poyck, by whom are you currently employed.

A. Asbestos Manhattan, Inc., Manheim, Pennsylvania.

Q. In August of 1977, by whom were you employed.

A. Metropolitan Edison Company.

Q. When did you leave Metropolitan Edison.

A. May 21st of 1978.

[64] Q. In August of 1977, what position did you hold.
A. Coordinator of services at Three Mile Island Nuclear Generating Station.
Q. And what did that position involve in terms of job duties and types and classes of people you came in contact with.
A. I was involved in administrative supervision at the plant and specifically I assisted the station superintendent and unit superintendents in matters of labor relations on the site.
Q. Now, how did you become involved in the situation at Three Mile Island on August 30, 1977.
A. I was called at home at 6:00 o'clock in the morning and informed that there was a craft union picket line forming at the north gate and I came to work at that time.
Q. Perhaps you can answer the Judge's question as to the union that was picketing at the the gate at that time, if you know.
A. Yes, I do, on August 30th, it was the Operating Engineers' Union.
Q. Did they have employees employed by Metropolitan Edison.
A. Not by Metropolitan Edison Company, no, by a sub-contractor.
[65] Q. Do you know the name of the company.
A. Catelytic, Inc. They were also employed by United Engineers but I think the people that were on the picket line were at that time employed by Catelytic.

JUDGE MILLER: Is that a sub-contractor of Metropolitan Edison or is that a sub-contractor of the general contractor who was doing the construction project.

WITNESS: It is sort of complicated. They were under two different contracts to us at the time. They were contracted by GPU Service Corporation to complete construction and they were also con-

tracted by Metropolitan Edison as a maintenance contractor. So the group of people that were picketing, I cannot say for sure who they were employed by at the time. They were all out of the local hall and they could have been employed by United Engineers or Catelytic under the construction agreement or Catelytic under the maintenance agreement.

JUDGE MILLER: Who were they having the dispute with.

WITNESS: They were having the dispute with Catelytic, as I understand it.

JUDGE MILLER: Okay.

Q. Now, Mr. Poyck, we have you receiving a call at home about 6:00 a.m. on August 30, 1977. Can you pick up from there and recount your contact with the incident.

[66] A. Yes, sir. I live in Lancaster, and it took me about forty-five minutes to get to the plant. So I arrived there about 6:45. I entered the north gate in my automobile. The picketers were there. I encountered no resistence. I drove in. I saw Mr. Hahn standing at the north gate entrance. I said something to him briefly from my car window.

Q. Can you identify Mr. Hahn and tell us what is his position.

A. Yes, Mr. Hahn was the administrator of personnel at Three Mile Island at that time.

Q. That is a company supervisor.

A. Yes, sir.

Q. Okay. Pick up from Mr. Hahn.

A. I continued into the plant and met with Mr. Gary Miller who is the station superintendent and Mr. James O'Hannon, who is the unit superintendent for unit one.

I discussed the situation with them and proceeded back to the north gate. From there, I

proceeded into Middletown to the union hall and talked to Dave Lang at that time.

Q. Approximately what time would this be.

A. About 7:15.

Q. All right. What did you say to Mr. Lang and what did Mr. Lang say to you.

A. I talked to Dave myself, just the two of us privately in the back of the union hall. I emphasized to him the seriousness of the situation. He understood
[67] that seriousness and we talked that for a couple of minutes. I tried to emphasize to him that the company was going to view this as a very grave matter and he told me that the Brotherhood had collectively decided that they were not going to cross the picket line until the pickets were removed and that was the way it stood.

At that point, I left the union hall.

Q. From the union hall where did you go.

A. Back to the north gate, the picket line location. I stood there with Mr. Hahn to observe the activities and shortly thereafter, Mr. Hombach arrived and asked me if I would return with him to the union hall to talk to the union officers again.

Q. Approximately what time in the morning was that.

A. I think that was about 8:15.

Q. Did you return to the union hall with Mr. Hombach.

A. I did.

Q. Tell us what took place.

A. We parked the car and got out and Mr. Hombach talked directly to several union officers. I specifically remember Mr. Lang being there. I did not — I can't say exactly the words that were spoken by Mr. Hombach. I did not engage in the conversation but I was right beside him. The essence of it was that he again affirmed the company's position that it was the responsibility of the union to

[68] cross the picket line and come to work and the result of it was the union officer's response was that they were not going to come to work until the pickets were removed.

Q. Now, when you say the union officers' response, will you tell us by name.

A. As I recall — the only one I recall was Mr. Lang.

Q. What do you recall Mr. Lang saying to Mr. Hombach.

A. I cannot specifically say what he said. I know that it was a negative response and he said that they were not going to come back until the pickets were removed but I do not know the specifics actually. I do not remember them.

Q. Now, how long did you stay at the union hall on that occasion.

A. It was a short duration. I do not think we were there more than five minutes or ten minutes at the most.

Q. And from the union hall where did you go or what did you do.

A. Went back to the north gate again and stood by there and observed the activity on the picket line.

Q. Does that conclude your personal contact with the situation on August 30th.

A. Not completely, no, it does not.

Q. Tell us what you have left out, in terms of Messrs. Lang and Light.

A. I talked to Mr. Light at least once when I was
[69] standing on the picket line. He walked across. He was there talking to the picketers. He walked over and talked to me and to Mr. Hahn. He told us at that time that even if he were to cross the line that he did not think the people would come in. That he was trying to get the picketers removed and he wanted to know if we were doing anything to try and get them removed.

I told him that whatever efforts were being made to remove the picket lines was being made by people on the site, the GPU people, the maintenance contractor, management, and labor and some contact with the crafts, I expected that there was some efforts being made. A little later in the morning then, the manager of the maintenance contractor arrived at the north gate and he proceeded to tape out some words on the sign at the north gate that indicates who is supposed to use that gate. He taped out the part that said something about contractor personnel. He came over and he told us that a decision had been made that their craft union people would no longer use the north gate. He said that a telegram had been sent to the locals of the trades and the Building Trades Council in Harrisburg informing them of the same.

At that time, I talked — Mr. Hahn and I were together during all of this. He and I talked to Mr. Lang and it seems to me that either Mr. Welsh or
[70] Mr. Bowman, I am not sure which was with Mr. Lang at the time. I pointed out to them that this had taken place and I suggested to him that if he told the picket line captain that that, you know, maybe that would take care of the situation as far as the pickets were concerned and they might leave.

In that conversation, Mr. Lang told me that he thought it would have more impact if it came from somebody in the company rather than from the union. I told him that I would relay that information to the picket line captain but I wanted to make it clear to him at the time that I was not in any way telling him that it was okay to wait until the pickets were removed to return to work.

He said, he understood that and he was not going to try and say later that, you know, I had given him permission to stay out or anything like that.

With that understanding, I proceeded down to the south gate, Mr. Hahn and I again, where we asked a mechanic of the operating engineers, who was the picket line captain apparently, and he was located and talked to him. He said if I could get him a written copy of telegram — that he had not seen the telegram — and that the people of his local had not gotten in touch with him yet. He said if he could see a written copy of that telegram that the chances were that they would remove the pickets on the north gate.

I went back, Mr. Hahn and I, and got such a copy and brought it out and showed it to him. At
[71] which time, he called the people at the north gate and told them that there was no reason to keep the picket line there any longer. This was at about — well, shortly after 11:00 o'clock.

Incidentally, Mr. Hombach, as I understand it, was at the union hall reading the message to Mr. Lang that Mr. Miller had given him over the telephone. At that same time, the picket line went down and everybody came back to work.

Q. And, insofar as that particular day is concerned, that was the end of your involvement.

A. Yes. I stayed there for a little time and watched the people come back at the north gate. That was the end.

MR. BURNSTEIN: I have no further questions.

JUDGE MILLER: You may cross examine.

MR. KOFMAN: Could we take a five minute break.

JUDGE MILLER: All right. Off the record.

(A brief recess was taken.)

JUDGE MILLER: Let's go back on the record.

CROSS EXAMINATION

BY MR. KOFMAN:

Q. Mr. Poyck, I believe you testifed on direct examination that after you spoke to the maintenance superintendent that he said he was going to tape up some words on the north gate that you spoke to Mr. Lang. Where was Mr. Lang at that time.

[72] A. It wasn't the maintenance supervisor, it was the supervisor of the sub-contracting company.

Q. Okay.

A. He was not a Met-Ed superintendent, if I led you to believe that.

Q. Now, you were at the north gate.

A. Yes.

Q. Was Mr. Lang at the north gate.

A. I am trying to remember exactly how this came to pass. I talked to him in his truck on the side of the road between the observation center and the north gate.

Q. Isn't it a fact that you actually waved down the truck when you saw that it was Lang's truck.

A. Yes. I think went to look for Lang. That is what I did. All right. I heard he was at the south gate, I think. I got in the car and started to drive up the road to see him. I wanted to tell him this. He was coming in the other direction and I waved and he pulled over and I parked the car and got out and walked across to him and talked to him in his truck.

Q. Was anybody with him in the truck.

A. Yes, there was one gentleman. I can't remember if it was Paul Welsh or Ron Bowman. That is my recollection but I think it was one of those two gentlemen.

[73] Q. Isn't it a fact that at that time that Lang told you he had just talked to the picket line captain at the south gate and the picket line captain had told him that he needed some written proof that the problem

was that they needed proof to that effect before they would take down the picket line. Do you remember that.

A. That is not the way I remember the sequence. What I remember is that I told Dave about this and then I went down and asked the guy and he told me he wanted written proof. That is the way I remember it taking place.

Mr. Hahn and I drove down and I went over and talked to the man and told him I had heard this and he said, I can't take your word for that. I want something in writing and that is when we went back and got it. That is the way I recall it because I know I went down there and talked to him and then had to go back and get it and bring it back.

Q. You did ask Mr. Lang to go down to the picket line and convey the message though.

A. I told him I thought that would help him to get the pickets off. He was making an effort to remove the pickets and I gave him that information and told him that if he told them that, they might leave.

Q. But Mr. Poyck, as a management official, it was your desire to have the pickets removed as quick as possible, aside from what the union's position was. That is correct, right.

A. It was my —

Q. Just yes or no. It is correct that you wanted to
[74] have the picket line removed as quickly as possible.

A. It was not my responsibility, the picket line.

Q. But wasn't it your objective when they called you at 6:00 o'clock at home to come down as quickly as possible, we have a problem with a picket line up. Your job, as a supervisor in the company, was to get that picket line down. Right.

A. No.

Q. That is not your job.

A. It wasn't my job. I didn't have anything to do with the picket line, absolutely nothing to do with it.

They did not have anything to do with the area of my responsibility. My responsibility was Metropolitan Edison Company employees on Three Mile Island and not craft union employees. I had nothing to do with them at all.

Q. Okay. You did not want to have the picket line come down. Is that what you are telling me.

A. I wanted to resolve the problem and I saw that this information might resolve the problem. I did not want to prolong the problem and make it worse than it was.

Q. But you did not care if it was resolved or not.

A. Oh, no, I cared.

Q. As a responsible official of Metropolitan Edison you realized that it would be to the company's benefit to have the picket line removed as quickly as possible.

[75] A. Yes, I think it would have been, yes.

Q. And the actions that you described in your direct testimony were effectuated toward that purpose, your actions.

A. Sure.

Q. Now, with that basis, you asked Mr. Lang to go talk to the picket line captain at the south gate, you did that because you thought that would be most effective way of getting the picket line removed.

A. I did not ask Mr. Lang to do it. Okay.

Q. You told him to.

A. I did not do either. I told him the information that I had heard and I suggested to him that if he went and talked to them himself — he had told us and Mr. Light had told us continuously during the morning that they were making every effort they could to remove the picket line to get the pickets down. They were not going to come to work. They were out there trying to remove the picket line. I told him that armed with this information, he may be able to accomplish that. At which time, he told

me that he did not think he would be able to but he thought maybe I could.

Q. So you are saying —

A. I gave him a suggestion.

Q. You did not care if that would be an effective way of getting the picket line removed. Is that what you are saying. That as to Metropolitan Edison's po-
[76] sition, the company's position, you did not care if that would be an effective fashion of getting the picket line removed. You just did that because you had a whim.

A. Oh, no, I wanted to see the thing resolved.

Q. As quickly as possible. Correct.

A. Sure. But it was not —

Q. Okay, that is enough.

MR. BURNSTEIN: May the witness be permitted to finish his answer.

JUDGE MILLER: I think the witness was being unresponsive.

WITNESS: No, I was just —

JUDGE MILLER: I will let Counsel clarify your answer.

MR. KOFMAN: Thank you, Your Honor.

Q. Mr. Poyck, when you had a conversation with Mr. Light, you emphasized to him that he was in big trouble because he was not crossing the picket line. That is correct, isn't it.

A. I probably said that.

Q. That is correct.

A. I don't know exactly what I said. I emphasized to Mr. Lang and Mr. Light both during the morning that I thought they were in serious trouble especially if they did not go in immediately.

Q. And it is also true that you participated in the August 4 to August 30 meetings. There were meet-
[77] ings on various dates, I think Mr. Robidoux testified about. You participated in those meetings discussing the August 4 work stoppage. Correct.

A. Some of the meetings.

Q. Okay, And at those meetings, you emphasized that you felt it was their obligation under the contract, as union officials, to cross that picket line as an example to the other employees. That is correct.

A. Yes, I am sure I did that.

MR. KOFMAN: That is all the questions I have.

MR. BURNSTEIN: I have no further questions.

JUDGE MILLER: Thank you, Mr. Poyck.

MR. BURNSTEIN: Mr. Hahn.

(Witness excused.)

Whereupon, GARY L. HAHN was called as a witness by and on behalf of the Respondent and after having first been duly sworn, was examined and testified as follows:

BY MR. BURNSTEIN:

Q. Mr. Hahn, would you state your full name for the record and spell your last name, please.

A. Gary L. Hahn, H-a-h-n.

Q. Mr. Hahn, what is your position with the company.

A. Administrator of personnel.

Q. How long have you been with the company.

[78] A. Approximately four and a half years.

Q. How long have you been assigned to Three Mile Island.

A. Four and a half years.

Q. What were your duties on August 30, 1977.

A. I was the administrator of personnel at that time and directly assisting Mr. Hombach, personnel director, in personnel administration and labor relations at Three Mile Island.

Q. How did you become involved in the incident of August 30, 1977.

A. I was called at my home at approximately 6:15 a.m. by the shift foreman stating that there were pickets at the north gate.

Q. What did you do pursuant to such information.
A. I came directly to my home to the north gate and I did observe the picket lines and I crossed through without any problem.
Q. Approximately what time did you arrive at the gate.
A. 6:35 a.m.
Q. Tell us what you observed and what you did and what you said.
A. Well, I passed through the picket line in my car and got out of the car and went over and started
[79] talking to the pickets. I talked to a fellow I assumed was the leader. He did most of the talking. I wanted to assure myself that our people would have no problem crossing the picket line and I asked him if he was going to attempt to stop our people from coming to work and he said, no.
Q. Did you see Mr. Lang or Mr. Light at the picket line that moring and, if so, would you tell what you saw and what time you saw them.
A. I saw Mr. Lang at approximately 7:10 and I saw Mr. Light later on in the morning, 10:00 o'clock or something like that.
Q. When you saw Mr. Lang at 7:10, what was taking place at 7:10 in the morning.
A. Mr. Lang pulled up and got out of his truck and started talking to the picketers and after he had completed his conversation, I walked over and started talking to Mr. Lang and we talked several seconds when a Metropolitan Edison bargaining unit employee pulled up and said, what should I do. I said, come to work. Mr. Lang said, go to the union hall.
Q. What did the union employee do.
A. He turned his car around and drove toward Middletown.
Q. Did you have any other conversation with Mr. Lang at that time.

[80] A. Well, I asked him why they were not coming to work. I do not remember the exact wording, what I asked him. But he said they took a vote previously not to cross the picket line.

Q. Did you make any response to that statement.

A. I don't think I did, no.

Q. What next transpired that you were involved in.

A. I talked to Mr. Poyck and Mr. Hombach throughout the morning. I think Mr. Lang left the line and went to the union hall at that time. Mr. Poyck came in and I talked to Mr. Poyck and he went in and talked to Mr. Miller, the station superintendent.

Q. Did you have any further conversation that day with either Mr. Lang or Mr. Light.

A. Yes, I was present when Mr. Poyck was speaking to Mr. Light about his obligation to bring the people in to work.

Q. Did you observe either Mr. Light or Mr. Lang at any other times during that day on the picket line.

A. Mr. Light was there on and off throughout the morning talking to the pickets.

Q. But that was the only conversation you had — the only direct conversation you had with either one of them.

A. On the line, yes.

Q. Well, what about other places.

[81] A. Well, I was with Mr. Poyck and he stopped Mr. Lang in his truck.

Q. But you did not say anything in that instance, did you.

A. No.

Q. Now, insofar as the August 4 incident, were there any discussions with employees concerning the August 4 incident, afterwards.

A. Yes, there were.

Q. Did you participate in those discussions.

A. Yes, I did.

Q. Will you tell us when such sessions were held, who was present and what was said by yourself and other parties.

A. One such meeting was on August 8th with Mr. Hombach and I was present and he was meeting with Mr. Light and Mr. Janowski and Mr. Cody and he told them — that was the meeting when an employee interrupted the meeting and said something about a vote being taken not to cross the picket line but instead to go to the union hall. He emphatically told them that they better not go to the union hall that they had better report to work.

Also in subsequent meetings, what was expected of bargaining unit employees when they approach a picket line.

Q. As to those meetings, did you personally participate in them.

[82]

A. Yes, I did.

Q. How did those meetings come about. Who was in them and what was said in the meeting, the meetings that you personally were in.

A. Most of the meetings were the result of a discipline which was awarded as a consequence of the August 4, incident and we handed out the disciplinary actions and just about every meeting — I would say every meeting the employees asked what was expected of them if they were confronted with another picket line and we told them to report to work through the picket line and if there is any threat of violence at all, we would have a company representative at the gate directing them to the observation center. The initial thing was to come to work.

Q. Returning again to August 30, you have recanted all of your direct participation in that incident. You told us about that already, have you no other items that you failed to tell us about on August 30th.

A. Just the fact that I was with Mr. Poyck most of the morning, the latter part of the morning.

MR. BURNSTEIN: I have no further questions.

MR. KOFMAN: A few minutes, Your Honor.

JUDGE MILLER: All right. We will take a few minutes. Off the record.

[83] (A brief recess was taken).

JUDGE MILLER: Let's go back on the record.

CROSS EXAMINATION

BY MR. KOFMAN:

Q. Mr. Hahn, isn't it true that the first thing you did after reporting to the north gate on August 30 was to call up Dave Lang and tell him to report to work because there was a picket line up.

A. No.

Q. You deny — you did not call him.

A. I called him but not the first thing.

Q. Okay. What time did you call — you did call Lang at home.

A. Yes, I did.

Q. And you called him at home about 6:45.

A. Probably about 6:45.

Q. About five minutes after you got there.

A. Ten or fifteen minutes.

Q. Okay. You called Lang at home and you told him to report to the picket line.

A. I said his people were not coming to work and it would be a good idea if he came.

Q. He did show up about fifteen minutes later.

A. Yes.

[84] Q. Now, you testified on direct that while — at this time period — Lang is there and you are talking to him and an employee drives up and he says, what am I supposed to do.

I believe you testified that Lang said, go to the union hall. Is it possible that Lang said to the employee, you know what you are supposed to do. And because you heard all of the rumors, you just assumed that he meant go to the union hall.

A. No. It was very clear. He —

Q. That is okay. You answered the question.

You also testified on direct that rank and file employees had voted not to cross the line. Are you sure that he did not say that the membership had determined that they were not going to cross the picket line.

A. My recollection is that he said voting.

Q. Are you positive or is it possible that he said that the body has determined that they are not going to cross any future picket line.

A. That is possible. It was something to that effect.

Q. You talked about the meetings with the employees when they were informed of what they were supposed to do. These were like individual counseling sessions with two or three employees at a time. Is that correct.

A. Yes.

[85] Q. These were only the employees that had been disciplined for the August 4 work stoppage and these employees constitute less than half the bargaining unit. Is that correct.

A. Maybe a little more than half.

Q. But in that area.

A. Yes.

MR. KOFMAN: That is all the questions I have.

REDIRECT EXAMINATION

BY MR. BURNSTEIN:

Q. This first conversation you had with Mr. Lang in the morning as soon as you arrived at the site, will

you tell us again, as best you can recollect, exactly what you said to Mr. Lang.

A. Mr. Lang was not on the picket line when I arrived. I called him and told him that his people were not reporting to work, that there was a picket line up, and he had better come to the north gate and try to straighten it out.

Q. It was shortly thereafter that an employee drove up to the picket line and you were there with Mr. Lang.

A. Yes.

Q. Did the employee say anything.

A. He said, what should I do.

Q. What response was made to that question and by whom.

[86] A. I said, go to work. Dave — Mr. Lang, said, go to the union hall.

Q. Who responded first.

A. I did.

Q. And you are positive that Mr. Lang said, go to the union hall.

A. Yes, it was clear to me because I thought at that moment that he was disobeying a direct order. That was why it was impressed on my mind.

Q. What action did the employee take as a result of that conversation.

A. He turned his car around and drove toward Middletown.

Q. I take it that he did not go to work.

A. That is true.

MR. BURNSTEIN: I have no further questions.

REDIRECT [SIC] EXAMINATION

BY MR. KOFMAN:

Q. At what time was this incident you just described.

A. 7:20, 7:30.

Q. It was before 7:30.
A. Possibly. Probably.
Q. Probably, almost positively. Mr. Lang got there about 7:00 or 7:15.
A. I would say around that.
[87] Q. And it was about 7:15 that the conversation occurred.
A. 7:20 to 7:30, something like that.
Q. But before 7:30.
A. I think so.
Q. Okay. And the employee's time to report to work is 7:30, is that correct.
A. The employees report between 7:00 and 8:30, I don't really know when he was supposed to report to work. Most employees report at 7:30.
Q. Okay. So it was most probable that the employee was not yet due to be in at work. Isn't that true.
A. Well, within a few minutes he would be.
Q. But it was still before his reporting time.
A. Yes.

MR. KOFMAN: That is all the questions I have, Your Honor.

MR. BURNSTEIN: I have no further questions.

JUDGE MILLER: You may step down.

(Witness excused.)

MR. BURNSTEIN: Your Honor, I have no further witnesses at this time. In light of the procedural status of the case, I have concluded my defense to the very brief opening of the Counsel for the General Counsel.

JUDGE MILLER: All right.

* * *

[99] * * *

Whereupon, DAVID C. LANG was called as a witness by and on behalf of General Counsel and

after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOFMAN:

Q. Would you state and spell your name for the record please.

A. David C. Lang, L-a-n-g.

Q. Mr. Lang, where do you live.

A. Box 366B Lusby, Maryland.

Q. Mr. Lang, have you ever been employed by Metropolitan Edison Company.

A. Yes, I was.

Q. When were you employed by them.

A. I was employed by Metropolitan Edison Company from 1968 to 1977.

Q. Okay, and where did you work.

A. I worked at Crawford Generating Station for the first year and a half and the rest of the time I spent at Three Mile Island.

[100] Q. Were you a member of the IBEW Union.

A. Yes, I was.

Q. Did you ever hold union office. If so, what offices and when did you hold them.

A. In 1970, I became a delegate to Systems Council and in 1972 I became president of the Local plus delegate to the Systems Council. I was re-elected a couple of times and in 1977 I was elected as chairman of System Council, president of the local union and delegate to the System Council.

Q. Why did you terminate your employment.

A. I terminated my employment with Met-Ed because I got a disciplinary action letter that said the next time I got in any trouble, I would be fired and being a family man I could not allow myself to be in that situation.

Q. Okay. Let me direct your attention to 1976. Do you remember that there was a work stoppage at one of the sub-stations of Metropolitan Edison.
A. Yes. I don't know if it was 1975 or 1976 but I was working and I got a call from either the steward of the EC&M gang or else it was from Dewey Schneider who is the company representative in Middletown line department and told me that the operating engineers had a picket line at the 500 KB sub-station.

I said there was nothing I could do about it and I did not know about it and I was not worried. The men went to the observation center to wait to see
[101] what was going to be done. A little bit later, I got a call from Jack Herbine. He was the station superintendent at Three Mile Island and he explained to me that it was my duty as president of the local to see that all of the local members would go to their place of work every day and it was my responsibility to move pickets.

We had a conversation. I have forgotten what it was. Finally, he said, take my car and go to 500 Sub and find out why the pickets are there and get them out of there.

So I went over and I talked to the leader of the picket line and he said they were there because Kreitz Construction Company was either raising the tower or unloading the breaker. I don't what it was. He said that he thought that Med-Ed should use the local operating engineers rather than bring Krietz in to do that job. Kreitz is from Reading.

I talked to him and I told him that I would go back and talk to the company and see if they could do something about hiring local people. The guy said, okay. He took his line off.

As I was leaving the 500 KB Sub, the EC& M gang came by and I told them to go in to work and that was the end of that.

Q. Let me direct your attention to August 4, 1977, can you tell me what happened that morning.

[102] A. On August 4th, I got to work around 7:00 o'clock or 7:15, something like that. I saw the Pipefitter Local carrying picket signs that said, "Unfair to Pipefitters" or something like that. It was against Med-Ed. So I got out of the truck and I went over and talked to the guy, the head of the stewards that was leading the line and he told me that the reason they were there was because Med-Ed. hired Mercury an outside contractor to do instrumentation work and the people from Mercury were from an aerospace local and they were not from the Harrisburg Labor Council.

So he said the line was going to stay there until something was done about it. I thin got in my car and drove to the observation center.

Q. How many pickets would you say were there or how many people were in front of the gate.

A. Just a guess but I would say there was a hundred people.

Q. At the time you got there, was there anybody from the company on your first visit to the gate.

A. When I first got to the gate that morning, I don't think there was — there was company people there but they were turning around and going to the observation center.

Q. Why did you go to the observation center.

[103] A. I went to the observation center because a couple of years before that, there was a threat of — one of the crafts in Harrisburg was going to put up a picket line. In forget why it was. We had a meeting with the company and they said to us that if there was ever a line there and you had a problem and you could not cross, to report to the observation center and that is what I did. That is what everyone did.

Q. What did you find when you got to the observation center.

A. I got to the observation center and there was a bunch of people there from the local and a handful or more of management people. They were just all standing around on the parking lot just talking.
Q. What did you do.
A. The first thing I did when I talked to the steward originally, I got the phone number of the Pipefitter BA and I went down to the observation center and used the pay telephone and tried to call him at his business office and at home and I kept getting a busy signal or else when I did get through they said he was not in for the day or something like that.

People were around and I wanted to talk to company people so I got Dewey Schneider who lives right besides the observation center. I got him up and he opened the observation center so we could use the phone and get in contact with company officials.

[104] Q. So what happened next.
A. Well, in the meantime, I started having conversations with Walt Poyck, Gary Hahn, Tom Hombach, and I had a phone call from Leading. I don't know if it was Mr. Robidoux or Mr. Herbine. He told me that we should get the people in to work and we had no business not crossing the line and we are going to be in trouble if we do not go in.

I told him that there was threat of personal injury and a lot of people knew the pipefitters because they were neighbors of the pipefitters because most of them lived in Middletown and the guys just refused to cross the line while they were there.
Q. So what happened then.
A. We kept talking to the company, conversations, I don't know what they were about, just basically that we should get to work. I went back down to the picket lines and we picked up the steward and he came up and we had him call the craft BA. When he called, he got through and I talked with the BA and

told him that he was getting my people in a bad position and he was getting us in trouble and people would be disciplined. He told me he wanted to talk to the steward again. The steward talked to him on the phone and he came back to me and the steward said, okay, I am going to take the line down.

Gene or someone then goes with the steward
[105] back to the line to take the line down and I went to the observation center and got all of the people together on the front lawn and I was up on the balcony and I told him that we were going to go into work.

Q. About what time was that.

A. I guess about 9:00 o'clock.

Q. What happened then.

A. At 9:00 o'clock, I don't know if I went first but most of the E Board went in first and the majority of the people followed. Some did and some went home and some went different places. We went in to work and as soon as we got there, I got the E Board together and Gary Miller who is the plant superintendent and we had a meeting.

Q. When you went in to work, were there still pickets, some people from the pipefitters still at the north gate.

A. When I went in to work, there was about four — three or four — pickets standing over on the right hand side by the railroad tracks and the steward told me that they were just there and we had every right to just go by and don't worry about it.

Q. So you said you contacted Mr. Miller.

A. I contacted Mr. Miller and the E Board and I we went in to talk with Mr. Miller about — the gist of the conversation was: would people get paid for the
[106] day. What kind of discipline are you going to do and things like that. I don't know.

Q. Who were the members of the E Board — the E Board is the Executive Board.

A. Right.
Q. Who is on the executive board.
A. The executive board was John Cody, Ron Jones, Paul Welsh, Len Wright — but he wasn't there that day because he was an operator and he was off — Gene Wright. I am not a member of the Executive Board but I was present so I was there. I guess that is it.
Q. What happened after that.
A. After the meeting with Miller, Miller said that he could not give us any answers because he just did not have the power to make that type of decision and he said that he would get back to use as quick as he could.

So then the E Board and I talked and we decided that we would have a local union meeting that night to get things straight because half the people did not show up and half the people were made at us for going in and so we figured we had better get it straightened out.
Q. Okay, when was the meeting held.
A. We held the meeting after work. The meeting probably started at 5:00 or 5:15, something like that. In the meantime, during the day, I called the
[107] International office and explained to them about the picket line and they explained their position. I also called our attorney's office, Jerry Gerber's office and he explained the legal.

MR. BURNSTEIN: I would object to his testifying to anything Mr. Gerber said.

JUDGE MILLER: I sustain the objection as to hearsay.

MR. KOFMAN: I don't —

MR. BURNSTEIN: He started to —

JUDGE MILLER: He wasn't quite there yet. All right, proceed.
A. I called Gerber's office and he told me what he thought I should say to the people that night. So we

had the meeting at whatever time we had it and I explained what the legal position was and what the International Office's position was to the people and their position was that we should have crossed the picket line and gone to work.

MR. BURNSTEIN: Should.

WITNESS: Should have. It seems some of the people that did not come in that day had gone drinking and things and the meeting after a while got out of hand. I tried to keep order but I did not do a very good job of it. During the course of the meeting, after what I had given them what I thought the people should know, a couple of people stood up and they got a little radical and they got to supporting people and one guy made a motion that the next
[108] time there is a picket line that no one should cross. I refused to accept the motion because I said that it was my opinion that the motion was out of order and that we could not do anything like that.

He just kept clammering away and finally somebody stood up on the floor and said, I agree with Norm, we just will not go in. And that was it. I said, well, I don't think you are right but since you are not going in, the only thing I can suggest is that everyone comes to the union hall so that the next time we don't have people hanging out in bars and things like that.

Q. Was it Norm Reismiller that was advocating this.

A. Yes, Reismiller was the spokesman for the radicals, was the spokesmen.

Q. Now, after August 4th, you had meetings with management personnel. Can you tell me if you participated in meetings and what was said.

A. I had quite a few meetings and I went to Reading twice. Once for some other meeting but we met with Mr. Robodough down there twice, I think. I had meetings with Mr. Hombach and Hahn and

just as the meetings were basically that if there was another picket line the company does not care. On the August 4th incident, we should have been in right away and we had no business not crossing the line.

Q. Was there any discussion as to your responsibility as a union official.

[109] A. Basically, if there is another picket line, the company does not care. We should cross. And on the August 4th incident, we should have been in right away. We had no business not crossing the line.

Q. Was there any discussion as to your responsibility as a union official.

A. They said that Gene Light and my main responsibility was to come across the line right away so everybody would follow us.

Q. Directing your attention to the morning of August 30th, can you tell me what happened.

A. August 30th, I got a phone call some time in the morning, twenty of 7:00 or something like that. Gary Hahn told me that there was a picket line up and the IBEW people were not crossing the line and I ought to come in and see what could be done.

So I got dressed and went in and when I got there, I saw Mr. Hahn standing in the front by the picket line. So I went and talked to the operating engineer's steward or captain or whatever he was. He told me that the reason he was there was because since Catalytic contract, they were not going to employ any operating engineers and his people were upset because they were loosing a lot of work that they felt should be theirs. He said he was not taking the line down until he was ordered to do so by his BA. I got the BA's phone number from him and I

[110] called him later on that morning. In the meantime, I went back and talked to Mr. Hahn for a little while.

Q. What was your conversation with Hahn.

A. There was a lot of small talk but basically I guess

what he said, you know your obligation is to go in and work.

Q. Okay. Did anything else happen during that conversation that you can recall.

A. I was talking to him and Tom Lynch drove up in the Jeep and he said to me, what should I do. I said, You know what you are supposed to do. He never got out of the Jeep. He took the jeep and drove to the union office. I saw him later at the union office.

Q. Did Hahn say anything.

A. My recollection is that he did not say anything at that time.

Q. What did you do next.

A. Sometime in the morning, it was before 7:30, I went to the union hall and there were people all over the place and it turned out I was the only one that had a key. So I opened the door and people went inside and I tried to call the operating engineers steward and got the same thing as before. He wasn't around. His line was busy. I did get hold of him later on but it was later on in the morning.

I then told Gene Light to call Welsh and Ron Bowman to go down to the operating engineers and
[111] see if you can negotiate with them guys and get them off the bridge so the people can go to work.

Q. About what time was that.

A. That must have been right around 7:30.

Q. What happened after that.

A. Some time after that — I am not sure of the time — Tom Hombach drove up and him and I had a conversation and he told me the same thing as before that I should go to work. I should lead people. If I went in people would follow me, you know, conversation like that.

Q. How did you respond.

A. I told him that it was the consensus of opinion that the people were not going in and that no one would go in or cross the line until the line was completely down.

Q. What happened after that.
A. The time is a little messed up. Somewhere along the line, Gene and Paul and Ron came back and we got all of the people together and Gene went in and Gene explained to the people just why the pickets were there and that they had no intention of leaving until they were told to do so.

About five minutes later, I sent Gene and Paul back down to try to talk to the guy again and see if he could get him to change his attitude or anything like that.
Q. Okay. What happened next, do you remember.
A. I was getting phone calls from different people. I had a phone call or two from Gary Miller and I called
[112] the International office again and they were just having a meeting. Poyck and Hombach came up but I do not recall — no Poyck came up by himself and him and I were in the back room of the union hall and we had a conversation just like we had with Mr. Hombach. It was my duty to go to work and if I would these people would probably follow me in.
Q. How did you respond to Mr. Poyck.
A. I told him the same thing I told Mr. Hombach that it was the consensus of opinion that people would not go in. I felt that it was better if I stayed out because at least I could negotiate with the pickets.
Q. Okay. What happened next.
A. The day went on and I was still having phone conversations but I do not recall half of them. Gene and Paul came back and somewhere along the line, I was supposed to go talk with the operating engineers again. Yes, I went to talk with the operating engineers, the steward and myself. Paul Welsh and I went down there to talk to them and I said to the guys, you know, what do you have to do. This is now at the south bridge. What do you have to do to get you guys off the bridge. We are getting a lot of

threats from the company about disciplinary action and the people are upset.

The guy said, what we need is no more contractors crossing the north bridge.

So I said, well, I don't know if I can do anything about that and Paul and I left. As we were coming
[113] up the road, Walt Poyck came down and waved us over. We did not go very far. He said to me, what is this guy's problem. I told him. He said, who is this guy and I pointed out the guy to him. Then Paul and I waited there for him and Mr. Poyck came back and he said, well, I am going to go see Miller and see what I can do about it.

Then I went to the union hall and just waited around.

Q. Did Poyck ask you if you would talk to the picket line captain.

A. I do not recall if he did or not.

Q. So what happened next.

A. Back to the union hall and I sent Paul and Clarence Newton back down. Somewhere along the line, I got word that Miller was going to write the letter and so we sent Paul and Clarence Newton down to watch and see when the line was coming down.

In the meantime, Tom Hombach came back up to the the Union Hall and about that time we got a phone call from Gary Miller.

We were told — he told me that he wanted to talk to Tom Hombach. He dictated a letter to Tom that explained the company's position. I think the letter said that I would be in serious trouble or something if I did not get the people back in to work. So we ran — Tom left the union hall and we got all of the people together and at the same time got a phone call from Paul Welsh and he said the
[114] picket line was down. We got all of the people together and we told them that the picket line was

down and they could go to work but I was also going to read the letter that Gary Miller dictated to Mr. Hombach. I read the letter and then we went to work. I hung around and locked up the union hall. I guess I might have been the last one to leave.

Q. Now, you testified that there was a union meeting on August 4. Was there an intervening union meeting between August 4 and the August 30 work stoppage.

A. Yes, between August 4 and August 30th, we had a lot of people that came to me and said that we don't think what we did on the 4th was very rational so we should have another meeting and see if people still want to do that again.

So we had a meeting and I don't know the date. It was between the 4th and the 30th and I read a letter to them that the lawyer's office sent me on the legal rights of secondary contractors picketing main contractors in a company like that. At the end of that meeting after I read all of that, a voice came out of the crowd and said, let's keep things just as they were. That is how the meeting ended. We could not get the people to change their mind.

Q. Okay. You were union president in 1973.

A. Yes.

Q. You told me who were the union officers and the members of the Executive Board in 1973.

[115] A. 1973.

Q. Specifically at the time there was a wildcat work stoppage.

A. I was president, Ron Reismiller was vice president, Tom Brubaker, Jack Kern, Ron Bowman, Cody, Tom Cody, and Gene Light.

Q. They were on the Executive Board.

A. Yes.

Q. Were people disciplined in 1973 for the 1973 work stoppage.

A. Yes, they were.

down and they could go to work but I was also going to read the letter that Gary Miller dictated to Mr. Hombach. I read the letter and then we went to work. I hung around and locked up the union hall. I guess I might have been the last one to leave.

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Q. Specifically at the time there was a wildcat work stoppage.

A. I was president, Ron Reismiller was vice president, Tom Brubaker, Jack Kern, Ron Bowman, Cody, Tom Cody, and Gene Light.

Q. They were on the Executive Board.

A. Yes.

Q. Were people disciplined in 1973 for the 1973 work stoppage.

A. Yes, they were.

Q. Tell me what the discipline was and who got it and if you know someone else other than yourself, tell me how you know that.

A. Well, I don't know what the average person got. I do but I forgot. I got a twenty-five day suspended to five. All of the officers got twenty-five days suspended for five. The reason I knew that was because Pete Balez and I were on vacation when they gave the discipline out to the officers and Pete and I had to go down to Lebanon Division office and we were handed our discipline personally by the Lebanon Division manager and he told me that all the officers got twenty-five. He told me what everyone else got but I don't recall what it was.

Q. Did you talk to the other officers and executive board members.

[116] A. We had a meeting afterwards with the Board about the discipline and we were looking for cases to take to arbitration and we found two of them that we liked and those we took and the rest of them we just did not pursue any further.

Q. Now, did you have an interview with Mr. Robidoux about the August 30 discipline that was administered to you and Mr. Light.

A. Yes, September 8th, September 9th, Gene and I were called to Reading and we met with Mr. Robidoux and Mr. Herbine in a room, just us four. They sat down and told us what the discipline was going to be for union officers.

Q. Do you remember why they said you were being disciplined.

A. The reason that we got disciplined was that we were union officers and we should have asked people to come in to work and that is basically it. We should have forced the people or showed by example they should come to work because we were the officers and they would have followed us.

Q. Did you ever tell any company official that employees had voted to honor future picket lines.
A. No.

MR. KOFMAN: I think I am finished. Just let me check my notes.

That is all the questions I have for Mr. Lang.

[117] MR. BURNSTEIN: Could I have a couple of minutes.

JUDGE MILLER: Sure. Off the record.

(A brief recess was taken.)

JUDGE MILLER: Back on the record.

MR. BURNSTEIN: I have no questions.

JUDGE MILLER: You may step down.

(Witness excused.)

MR. KOFMAN: I would like to call Paul Welsh, please.

Whereupon. PAUL WELSH, JR. was called as a witness by and on behalf of the General Counsel and after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOFMAN:

Q. Would you state your name for the record please.

A. Paul Welsh, Jr. W-e-l-s-h.

Q. Mr. Welsh, where do you live.

A. Middletown, Pennsylvania.

Q. Where are you employed.

A. Med-Ed Three Mile Island.

Q. How long have you worked there.

A. Approximately three years.

Q. Are you a member of the IBEW union there.

A. Yes, I am.

[118] Q. Do you hold a position with the union.

A. Yes, Financial Secretary, Executive Board.

Q. At what time period did you hold that union office.

A. Approximately about June until November, 1977.

Q. I direct your attention to August 4th. Did you attend a union meeting that afternoon of August 4th.

A. Yes, I did.

Q. Can you tell me what occurred at the meeting.

MR. BURNSTEIN: I object. I forebore the last time. That is hearsay as to the company and this litigation.

JUDGE MILLER: It is but I am going to allow it.

MR. KOFMAN: Thank you.

A. Yes, I can.

Q. Tell me what happended at that meeting.

A. Well, Mr. Lang presided. He told me he wanted to have an orderly meeting and give everybody a chance that wanted to speak and the first one to speak was Ron Reismiller and he called everybody a scab that crossed the picket line.

Q. When you say crossed the picket line, do you mean people that went in at 9:00 o'clock that morning.

A. Yes.

Q. Go ahead.

A. So Norm spoke and he felt, like I said, that anybody who crossed the picket line was a scab and in
[119] the future that if there was a picket line up there that no one should cross and he especially, you know, got on the Executive Board for going in.

Q. Okay. Do you know what else happened at the meeting.

A. Mr. Lang stated that he called the International that afternoon and got their position on it and they said it was an illegal picket line. He explained this to the Board and Norm Reismiller said that he did not care that it was a picket line and we should honor it.

MR. BURNSTEIN: Your Honor, so I don't keep interrupting, could I have a continuing objection.

JUDGE MILLER: You have a standing objection.

MR. BURNSTEIN: May I ask one question. I assume that no finding of fact will be made on this evidence that is binding on the company. Otherwise I want to increase the intensity of my objections.

JUDGE MILLER: I realize that.

MR. KOFMAN: Your Honor, I think, reading the relevant case law, that the union did not recognize nor authorize nor sanction the strike here or the wildcat work stoppage that occurred on August 30th.

JUDGE MILLER: I think that was stipulated.

MR. KOFMAN: Well, I am not sure. I think there was some testimony by management officials
[120] that Mr. Lang told them that and that there were rumors that the union had voted to honor the picket line in the future, using union as IBEW Local 563 rather than brotherhood on their own. I think that could be a significant fact depending upon how the higher court views the law and I just wanted to make it clear that that is not the case. The union did not authorize nor sanction this strike.

MR. BURNSTEIN: Well, I would like to be heard on this point. One of the basis of my objection is that there is no connection between any of these incidents or transactions amongst the employees and the company. We have no knowledge of what took place. We are not responsible. They are not company officials. I just do not see how this can be binding on upon us but in any case, as long as I have my objection to the entire line of questioning.

JUDGE MILLER: You have Your objection. I will take it for this purpose.

Q. Do you know what else happened at that meeting.

A. Like I said, Norm Reismiller, he stated that we should never cross a picket line in the future. He did not want to see anybody else cross it. Another gentleman stood up and said, I will second that. We will not cross any picket lines when they are up again. Dave said, I cannot accept that. They just kept getting louder and louder and David just kept calling
[121] for order and that is about when it ended.

Q. Let me direct your attention to the morning of August 30th. Will you tell me what occurred that morning.

A. August 30th, I went to work and I did not even go the whole way to the gate. I seen there was a picket line and I turned at Boyer's Store — the gentleman I was driving with turned at Boyer's Store. We went to the union hall.

Q. What did you find when you got there.

A. I found a lot of people outside standing around talking.

Q. Did you speak to Mr. Lang.

A. Yes, I talked to him. At that point, he asked me and Ron Bowman and Gene Light to go down and find out what was going on and we went down.

Q. What happened when you went down.

A. Gene went up and talked with a gentleman. I guess he was a captain or a spokesman and asked him what the problem was. He started saying he felt they should be operating the equipment and they were losing jobs.

Q. What happened then.

A. The best I can remember, nothing. We left there and went back to the union hall.

Q. What happened after that.

A. Well, again we were at the union hall standing around talking and Dave asked Gene and I to go
[122] down and talk and ask the men if they could move the pickets long enough for us to get in to work. So we went back down. The guy we talked to the first

time was not there. So Gene was talking to another gentleman. I assumed he knew him, worked with him before. He explained what he wanted done and he said he could not authorize that. Gene said, just move the pickets long enough so we can get our people in to work and there is no problem.

MR. BURNSTEIN: I move to strike the entire conversation. It is hearsay evidence.

MR. KOFMAN: Your Honor, I did not object when Respondent's witnesses verified conversations. Mr. Light will testify next and he will tie up what Mr. Welsh is covering at this point.

JUDGE MILLER: I will let it stand. Overruled. You have a standing objection.

Q. What happened next, Mr. Welsh.

A. This gentleman said he would get on the CB and call down to the south gate becaue this was where the captain or whatever he was was. He was down there. I said this is a bad idea because he will get on the CB and he will have everybody from Catalytic and anybody that has a CB just storm that gate if they do move. So luckily, he did not get hold of the man. He could not raise him. So then I can't remember who called him but some one called him on the company side and mentioned something to him
[123] about coming in to work. I don't know if it was Tom or Gary. It was one of them but it has slipped my mind. They mentioned about getting the people to come in to work because they were not stopping them from coming in.

Q. Did any of the company personnel address you while you were there.

A. No.

Q. What happened next.

A. We went back to the union hall and told Dave what happened and we were standing around and Dave said to me, come along with me, we are going back down to the picket line. We went to the north

bridge. John was not there, yet. So we went to the South bridge and he was there.

Dave started to tell him that our people get disciplined pretty severe for not coming in and he wishes they would get the people off there so we could get in.

Then we got in a truck and we started to come back and Walt Poyck was coming down the road and he waved us and we pulled off to the side and he come over and started talking to Dave. I really do not remember clearly what he said.

Q. Okay. What happened after that.

A. Dave and I went back to the union hall.

Q. Okay.

A. The men were milling around and talking and I don't know if Dave was getting calls or what. I was outside and then Dave said to me, go down to the
[124] picket line and when they move the line, give me a call. So I didn't have a vehicle and I asked Clarence Newton to take me down. We went down and the pickets were still there. We drove down past the south bridge. They were still there. So we went down and turned around and came back to Boyer's store and we sat there. The pickets finally moved. I went in and used the telephone at the security building and called the union hall and told Dave they were moving.

MR. KOFMAN: That is all the questions I have.

MR. BURNSTEIN: I have no questions.

JUDGE MILLER: Thank you.

(Witness excused.)

MR. KOFMAN: I would like to call Gene Light to the stand please.

Whereupon, GENE R. LIGHT was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

BY MR. KOFMAN:

Q. State your name please.

A. My name is Gene R. Light, L-i-g-h-t.

Q. Where do you live, Mr. Light.

A. I live at 1690 Colebrook Road, Lebanon, Pennsylvania.

Q. Where are you employed.

A. I am employed by Metropolitan Edison at Three
1125 Mile Island Nuclear Plant.

Q. Are you a member of the IBEW Local there.

A. Yes, I am.

Q. Have you ever held union office.

A. Yes, I have.

Q. Can you tell me what office you have held and at what time did you hold the office.

A. Currently holding office of delegate to the Systems Council and Executive Board. During the August 30th incident, I was the vice president of 563. In October of 1977 until July of this year, I was president of Local 563.

Q. Okay. Directing your attention to the morning of August 4th. Will you tell me what happened.

A. August 4th, I went to the north gate and all kinds of cars were parked on both sides of the entrance to Three Mile Island, both sides of route 41. There was approximately a hundred or hundred fifty people across the gate.

Q. What did you do.

A. I immediately went to the observation center.

Q. What did you find there.

A. When I got to the observation center, there were quite a few people from the Local, management, Local members milling around up at the observation center.

Q. Did you speak to Dave Lang.

1126 A. Yes.

Q. Do you remember what the conversation was.

A. First of all, I asked Dave what was going on and

he explained to me that it was the pipefitters and it had something to do with the Mercury people that the company had hired to do some instrumentation work recently at Three Mile Island.

Q. Will you tell me what happened next.

A. Then Dave at that time told me to go around and make sure that none of the people leave. Tell them to wait until they hear further instructions from the company. So I milled around with the people for a while and then went back to Dave. By this time Dave had asked me to go along with him down to the north gate to talk to the steward, the BA.

Q. What happened then.

A. We went down and I think the gentleman's name was Kelly. He was the steward. The BA was not present at the time. Dave had emphasized to him that our people could be in a lot of trouble with the people having the gate closed off and we would appreciate them making as much effort as they could to get it removed and at that time, Mr. Kelly said —

MR. BURNSTEIN: Objection. Mr. Kelly is not a representative of the company.

JUDGE MILLER: Do we really need to get into all of this.

[127] MR. KOFMAN: I can withdraw that question. You do not have to go into what was going on. Just move on. What happened after you got back to the observation center.

A. After I got back to the observation center, Mr. Kelly made a phone call at the observation center calling somebody in the union.

Q. What was the outcome.

A. The outcome was that they were going to have the picket line removed.

Q. Okay. What happened then.

A. At that point, I took Mr. Kelly back to the north gate.

Q. Did Mr. Lang say anthing to you.
A. Yes, he did.
Q. What did he say.
A. When I returned, Dave was on top of the observation center and he told the people that it was their obligation to go to work and the picket line was coming down and they should report to work immediately. That is what happened.
Q. Thank you.

MR. KOFMAN: To avoid repitition, I will move on to some other parts of the testimony.

Q. There was a meeting held between August 4 and August 30, management personnel.
A. Yes.
[128] Q. Who attended the meetings and what was said.
A. On August 4th, there was a meeting held on Three Mile Island with the Executive Board and Dave Lang and with Mr. Miller.

Dave posed questions that related to that morning's incident.

A day or two later, we met — Dave Lang and myself met with Gary Hahn and Walter Poyck and that was to clarify the company's position. At that time, they informed us that it was part of our obligation to make sure that the people come to work. That was number one. One of the questions that Dave posed to the company was would the people get paid that were at the observation center if they were to report there. The company said no at that first meeting. Then there was another meeting a day or two later when they firmed up that position. The company said that it was our obligation to come to work and if there would be a line there, there would company representatives that would direct our people to the observation center and if they were directed to the observation center, they would get paid for being there.

Q. Were there any other meetings.
A. Not that I am aware of.
Q. Did anybody at any of these meetings from management tell you what your role was as an officer in
[129] the union in this type of circumstance.
A. Yes, at every meeting we were in with Mr. Hahn, Mr. Poyck and also the meetings that we were in with Mr. Robidoux and Herbine, they discussed quite heavily the fact that we should go across the picket lines.

MR. KOFMAN: I am going to skip the testimony about the union meeting. We have already had two people testify about it.

JUDGE MILLER: I appreciate that.

Q. I am going to direct your attention to the meeting of August 30th. Will you tell me what happened.
A. August 30th, I was heading through Middletown on the way to Three Mile Island at approximately five minutes after 7:00. I see several people heading toward the union hall waving their hands for me to follow. I didn't have to start work until 7:30 so I had plenty of time. When I got over there, I could see quite a few people congregating at the union hall who were scheduled to be at work at 7:00 o'clock.
Q. At that time did you speak to Mr. Lang.
A. Yes, I asked him what was going on. He said the operating engineers had pickets set up at the north gate at Three Mile Island.
Q. What happened then.
[130] A. At that particular time, Dave asked myself and Paul Welsh and Ron Bowman to go down and find out what the picketers demands were, you know, and to find out what we could do to settle this thing, you know, so we could get back to work.

I went down and talked to the lead man of the operating engineers. I assumed he was the lead man of the operating engineers and he was

discussing with me the facts of the different contracts, GPU and Metropolitan Edison had, and that he felt they were taking some of the work away from the operating engineers as far as the operation of the cranes, etc.

Q. Did you have any conversations with anyone from management when you were at the picket line.

A. Yes. I went across after talking with the pickets. I went across the railroad tracks and talked to Walt Poyck and Gary Hahn was in the vicinity at the same time. I talked to Walt and explained to him what the picketers had said to me and asked him if there was anything that he was doing to try to get this thing squared away. He mentioned at that time that they were doing something internally at the Island to try to handle the situation and he game me one or two items that he wanted me to relate to Dave, to go back to the union hall and relate to Dave and that is what I did.

Q. Did he say anthing to you about your role as a union official.

[131] A. Yes, he said that Dave and I were in big trouble if we did not go across the picket line.

Q. What happened then.

A. We went back to the union hall and explained to Dave and also explained to the people what I had done, talked to the representatives of the pickets down there and talked to the company and what Walt said that they were trying to do something internally to get the thing squared away and then Dave asked me again to go back to the picket line. To make any kind of deal I could so they would remove the pickets so our people could get to work.

Q. Did anyone accompany you when you went back.

A. Yes, Paul Welsh.

Q. What happened.

A. We went back and at that time there was ap-

proximately about five or six pickets across the entrance to the gate. One guy in particular I know from other places I used to work. I asked him if there was any way we could get these people removed and at that particular time, he said, well, he said, — I don't know if he used the word captain or the guy that runs this thing was down at the south gate. So at that particular time he called on the CB to try and get hold of him but couldn't. So he said to me, he said, what is you number there at the union hall and as soon as I can get hold of him, I will have him give you a call.

[132] At that time, Tom Hombach was there. Tom Hombach called me over and I went over and he also emphasized very strongly that we were in big trouble. Things were getting bad and that Dave and I were in big trouble. He also said that there wasn't that many people there to stop us from coming in or anything like that. I made some kind of statement to the fact that we wanted to get this thing resolved once and for all so it doesn't happen again. Then I went back to the union hall.

Q. Did you make a statement to any management official that the union had voted to honor the picket line.

A. No.

Q. What happened next.

A. Well, I went back to the union hall and explained to Dave what had taken place and then Dave and Paul went back down to see if this guy had contacted his boss or whatever to see if we could resolve something.

I waited there until they got back.

Q. Did you have any other contact with management officials on August 30.

A. Yes.

Q. What was that.

A. I would say approximately 10:30 or 11:00 o'clock

Mr. Hombach drove up to the union hall, pulled his car in, in front of the hall there, and Dave and I went out and talked to him. Dave had his head in
[133] the window and talked to him and I did not hear a whole lot of what the conversation was at that particular time. But I know he wanted to go use the telephone because there was a misunderstanding about the operations people at the Island. He was afraid that if they sent them home, it would look like the company was locking these people out.

I think he was heading for the telephone or getting ready to go to the telephone when somebody called him and we told him to come to the telephone. But anyway, he went to use the telephone.

Q. Did you have any further contact with management officials on August 30.

A. Somebody — I think it was Mr. Miller — had read something across the telephone and he gave it to Dave and eventually the people and the people went back to work.

Q. Okay. Did you have a meeting with Mr. Robidoux to discuss the discipline that grew out of the August 30 work stoppage.

A. Yes.

Q. Will you tell me who was present and what was said.

A. It would have been Mr. Robidoux and Mr. Herbine.

Q. Was anybody else present, other than yourself.

A. Yes, Dave, Dave Lang.

Q. When was this meeting.

A. Sometime after the August 30 incident prior to
[134] them giving us the discipline for August 30.

Q. Okay. Can you tell me what happened at the meeting.

A. Well, they discussed the different levels of discipline. They gave about three different levels of discipline, Dave and mine being the most severe with the twenty-five days.

Q. Did Mr. Robidoux say why you and Dave were given the most severe discipline.
A. Yes, because of the role we play as union officials.
Q. Did he say anything about what he thought you should do that day.
A. Yes, he said it was our obligation to cross the picket line.
Q. Was there any discussion at this meeting about what happened on August 4th.
A. Not to my recollection.
Q. Did you attend a meeting with Mr. Robidoux concerning a grievance that was filed over the August 4 work stoppage.
A. There was a meeting, I think it was late in September, the last couple of days of September. That was the third step grievance meeting about the August 4 situation.
Q. Who attended that meeting.
[135] A. The Systems Council delegates plus Mr. Robidoux and some key officials of the company.
Q. Can you tell me what occurred at that meeting.
A. Yes, we discussed the August 4th situation and the discipline surrounding it.
Q. Was there any discussion of the union official's role or what it should have been on August 4th.
A. Yes, I brought up the question. It was sort of implied by Mr. Robidoux that we had received discipline for August 4th and Dave and I had not received discipline for August 4th and he seemed very amazed by the fact that we did not.

MR. KOFMAN: That is all the questions I have, Your Honor.

JUDGE MILLER: Let's take a couple of minutes. I have to make a phone call to Washington.

(A brief recess was taken.)

JUDGE MILLER: Back on the record.

CROSS EXAMINATION

BY MR. BURNSTEIN:

Q. Mr. Light, what time did you get to the north gate, at what time in the morning on August 30.

A. Approximately twenty of 8:00.

Q. What time are you normally due to go to work.

A. 7:30.

[136] Q. Any particular reason for being late that day.

A. Yes, that is what I said. At approximately five after 7:00, I had seen the people heading toward the union hall and waving their hands and so I went to the union hall because I normally do. I start at 7:30 and I had adequate time to get over there.

When I got there, that was when I understood there was a problem and I was given direction by Dave Lang and that consequently was why I got down to the gate at twenty of 8:00.

Q. When you got there at twenty of 8:00 what did you do.

A. I talked to the guy that I thought was in charge of the pickets.

Q. Why.

A. Why.

Q. Yes.

A. To find out what the problem was.

Q. What concern was that of yours.

A. Obviously there was a picket line there and obviously a labor dispute.

Q. What concern was the picket line and labor dispute to you.

A. What was it to me.

Q. Yes.

[137] Q. You were due to report to work at 7:30. At twenty of 8:00 you got to the gate and talked to the pickets. I am asking you why.

A. Because Dave Lang asked me to find out what happened.

Q. Do you work for Dave Lang.
A. Do I work for Dave Lang.
Q. Yes.
A. In what capacity.
Q. In any capacity. Does he pay your salary. Does he pay your wages.
A. No.
Q. Who pays your wages.
A. Metropolitan Edison.
Q. You were due on Metropolitan Edison's premises at work, I assume, at 7:30.
A. Yes, I was.
Q. Were you there at 7:30.
A. No, sir.

MR. KOFMAN: Your Honor, I object to this line of questioning. There is no evidence in the record at all that Respondent disciplined Mr. Light because he got there at twenty of 8:00 instead of 7:30 but rather he did not report until the picket line was removed.

MR. BURNSTEIN: Well, I think if you will look at Respondent's Exhibits — perhaps not. If you
[138] will look at General Counsel's Exhibits 2(a) and 3(a) and (b) and I direct your specific attention to that involving Mr. Light which is 2(a) and (b) and you will see that it starts out by saying this discipline is being administered to you for your failure to report to work at your scheduled time.

JUDGE MILLER: Well, there is no question on this record that both of these employees did not go to work at their scheduled time.

MR. BURNSTEIN: And I am entitled to ask them why.

JUDGE MILLER: I think that is fairly obvious on the record.

MR. BURNSTEIN: It is my hope to make it more obvious, Your Honor.

JUDGE MILLER: All right, go ahead.

Q. At twenty of 8:00 you were talking to the pickets. Correct.
A. Yes, sir.
Q. After your conversation with the pickets, did you enter on the employer's premises.
A. Yes, sir.
Q. At what time.
A. Approximately 8:00 o'clock.
Q. You were on the employer's premises.
A. Absolutely.
Q. Did that necessitate your crossing the picket line.
[139] A. Sir.
Q. Did you cross the picket line to get on the employer's premises.
A. Definitely.
Q. Did you report to work upon crossing the picket line.
A. I talked to Walt Poyck at that time.
Q. Did you report for work when you crossed the picket line.
A. I talked to Walt Poyck and Gary Hahn. I don't know how they construed that. I don't know. I was on company property, yes.
Q. Did you report to your scheduled place.
A. No.
Q. Your normal work assignment.
A. No.
Q. What did you do.
A. I talked to Walk Poyck.
Q. How long did that conversation last.
A. Approximately ten to fifteen minutes.
Q. After that what did you do.
A. I went back to the union hall.
Q. Were you assigned to work at the union hall that day.
A. No, but I did take the two messages Mr. Poyck
[140] asked me to take back to Dave Lang at the union hall. I was instructed to do that.

Q. You were instructed by Mr. Poyck to take a message back. What message were you instructed to take back.
A. Number one, Gary Miller wanted Dave Lang to call him as soon as possible and he asked me if I would give that message and I did.
Q. You went down to the union hall and gave that message to Mr. Lang.
A. Yes, sir.
Q. What did you next do.
A. I next told Dave exactly what happened down at the north gate.
Q. What did you do thereafter.
A. Told the people at the union hall.
Q. What did you tell them.
A. I told them what the discrepancy was and the reason the pickets were there. And what Mr. Poyck had told me and what I had told him.
Q. How long did that take.
A. Sir.
Q. How long a period of time did that take.
A. Approximately a half hour forty-five minutes.
Q. When you were finished with that task what did you do.
[141] A. I went back to the line.
Q. When you got to the line what did you do.
A. I talked to one picket that was down there, on picket in particular that was familiar to me. I talked to Mr. Hombach.
Q. Did you cross the line when you reported for work.
A. I guess I did. I reported for work.
Q. You guess you did not report for work.
A. I guess I did.
Q. Don't guess. Do you know whether you did or not.
A. You said —
Q. I asked you whether you reported for work at

that time and you either did or you did not. So tell me did you or didn't you.

A. Repeat the question.

JUDGE MILLER: When you crossed the line, did you report for work.

WITNESS: No.

Q. Why didn't you report to work.

A. Because I was trying to get some information to take back to the union hall.

Q. Is that what Metropolitan Edison is paying you for.

A. No, sir.

[142] Q. In October of 1973, there was an occasion when you did not report for work. Is that correct.

A. Yes, sir.

Q. At that time you were given discipline, were you not.

A. Yes, sir.

Q. I would like you to look at the remarks section of Respondent's Exhibit 5 and tell me what that first sentence reads.

A. Disciplinary actions being administered to you for your failure to report to work at your scheduled time and place and for your participation in an unlawful work stoppage.

Q. The General Counsel has already stipulated that the instance of October 30, the incident of August 30, 1977 was an unlawful work stoppage. So I will come back to this question. You were disciplined once for participating in a work stoppage and not reporting for work. Why are you surprised now that you were disciplined.

MR. KOFMAN: I object, Your Honor, he never said he was surprised.

JUDGE MILLER: I sustain the objection. It is not a question of surprise. It is a question of the legal effect of what the company's actions are and General Counsel is obviously challenging the sec-

ond reason given in those disciplinary letters. The
[143] Company says that the action was taken because — in part because of their role in the union.

Q. At what time did you first report to work on August 30.

A. About twenty of 8:00 would be first time I went.

Q. When did you enter on Three Mile Island and commence your normal activities, at what point in time on August 30.

A. Approximately quarter after 11:00.

Q. Can you explain to us why it took you from 7:30 that morning to quarter after 11:00 to report to your normal work assignment.

MR. KOFMAN: I object. The question has been asked and answered more than once.

JUDGE MILLER: I think it is quite clear on the record what was going on from 7:30 till the time he reported.

MR. BURNSTEIN: Well, it is not clear to me.
[144] What was going on during that period to prevent him from reporting to work.

MR. KOFMAN: Your Honor, I have an objection pending for the first question.

JUDGE MILLER: I sustain the objection.

Go on to something else.

Q. What prevented you from reporting to work before 11:15 on the morning of August 30, 1977 at Three Mile Island.

MR. KOFMAN: I object, Your Honor, being repetitive.

JUDGE MILLER: I will let it stand. You may answer.

A. Repeat the question.

MR. BURNSTEIN: Read him the question.

JUDGE MILLER: What prevented you from reporting for work before 11:15 on August 30, 1977.

A. A labor dispute at the gate of Three Mile Island.

JUDGE MILLER: Did you hear that.

MR. BURNSTEIN: Yes.

Q. Now, I show you respondent's Exhibit 1 for identification and direct your attention to page 46 and 47 thereof, which is entitled no strikes and no lockouts.

Do you see anything in that language referring to labor disputes.

MR. KOFMAN: Your Honor, I object.

JUDGE MILLER: Let him finish the question before you object, please.

[145] MR. KOFMAN: I thought he was finished . . .

Q. Do you see anything there that would excuse your from reporting to work.

MR. KOFMAN: I object to the question. It has been stipulated that the work stoppage on the 30th was a contravention of the provisions which Mr. Burnstein is pointing out. It is now on the record that that is the case.

JUDGE MILLER: I sustain the objection.

Q. What role do you feel a union officer should play in the face of a situation such as that which occurred on August 30, 1977.

MR. KOFMAN: I Object. There is no need for conjecture. The facts are in the record and it is completely irrelevant what Mr. Light feels is the role of the union official. We can bring in law professors to question the facts.

JUDGE MILLER: I think — GO AHEAD.

MR. BURNSTEIN: I would like them a clarification of General Counsel's theory of the case. Is it his theory that any punishment accorded a union officer as a result of a wildcat strike is, per se, flatly illegal. If that is his position, perhaps it will obviate some of this testimony.

MR. KOFMAN: It is the position of the General Counsel that in a wildcat strike situation, if an employer singles out union officials for more severe discipline than the discipline of the other people be-

[146] ing disciplined because they participated in the work stoppage or because they participated and failed to urge strikers to return, then it is an unfair labor practice as the Board states in Precision Castings. It is a clear violation of the plain language of section 8(a)(3). In the Precisions Castings case, if you read the ALJ decision, the employees there actually picketed. They not only participated, they picketed and they were singled out for being union stewards and under the contract they had an affirmative duty to urge employees to go back to work, a provision which is not in the contract of Respondent's Exhibit 1. I think, in light of that, any speculation of Mr. Light as to what the role of a union official is, in a wildcat strike situation, is spurious to the case. We have already got testimony as to what Mr. Light and Mr. Lang did on the day in question.

MR. BURNSTEIN: I would still like my question to stand. If you sustain the objection —

JUDGE MILLER: I sustain the objection.

Q. At any time during the morning of August 30 did any company official direct or suggest or request that you personally go to work.

A. Yes.

Q. Who made such a suggestion.

A. Mr. Poyck.

Q. Did you follow that suggestion.

[147] A. No, sir.

Q. Why did you not follow that suggestion.

A. Because I felt I would like to get this straightened out once and for all. We could not continue every day having to put up with these labor disputes. We felt, you know, through what the company was doing and what the union was doing that we would come up with some kind of solution that would remedy this thing.

Q. But there is no question but that he did instruct you to go to work through the picket line and you declined to follow these instructions.

A. I would say there is no question.
Q. Is it not true that Mr. Lang received similar instructions in your hearing from company officials.
A. I was never with Mr. Lang when he received that instruction.
Q. At the time you reported to work the pickets had been removed. Is that correct.
A. At the time I reported to work.
Q. Yes, when you finally went back across the line, the line had been removed.
A. Yes.
Q. The pickets were not there.
A. There were a couple of people on the side, you know, going to their cars and stuff. There were
[148] none across the bridge, no.

* * *

Opposition

1

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No. 81-1664

In the Supreme Court of the United States

OCTOBER TERM, 1981

METROPOLITAN EDISON COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals, upholding the Board, properly concluded that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by imposing greater discipline upon union officials than it imposed on other employees for failing to make "every effort" to halt a contractually prohibited work stoppage, in the absence of a contractual provision requiring such officials to do so.

2. Whether the court of appeals properly concluded that an arbitrator's construction of a prior collective bargaining agreement between petitioner and the union was not binding on the court in construing a subsequent collective bargaining agreement.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-21) is reported at 663 F.2d 478. The decision and order of the National Labor Relations Board (Pet. App. A-22 to A-29), and the underlying decision of the administrative law judge (Pet. App. A-30 to A-49), are reported at 252 N.L.R.B. 1030.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-50) was entered on December 9, 1981. A timely petition for rehearing was denied on January 5, 1982 (Pet. App. A-51). The petition for a writ of certi-

orari was filed on March 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act ("the Act"), 29 U.S.C. 151 *et seq.*, are set forth at Pet. 3.

STATEMENT

1. On August 30, 1977, upon their arrival at petitioner's Three Mile Island jobsite, petitioner's employees, who were represented by the International Brotherhood of Electrical Workers (the "Union"),[1] were confronted at the main entrance by a picket line established by the Operating Engineers protesting the refusal of one of the jobsite contractors to hire its members. In violation of the no-strike clause of petitioner's agreement with the Union,[2] petitioner's employees refused to cross the picket line. Petitioner's officials telephoned Union President Lang, advised him of the situation, and requested him "to see what could be done." (Pet. App. A-32 to A-34.) Lang accordingly went to the jobsite early that morning and, together with Union Vice President Light, sought to have the picket line removed. Thus, when Lang reached the picket line, he spoke with the Operating Engineers' picket captain, who explained the

[1] More than half of petitioner's employees are represented by five locals of the International Brotherhood of Electrical Workers, AFL-CIO (Pet. App. A-31).

[2] The collective bargaining agreement provides in pertinent part that "there shall be no strikes or walkouts by the [Union] or its members, * * * it being the desire of both parties to provide uninterrupted and continuous service to the public" (Pet. App. A-32).

reason for the protest and stated that the picketing would not end unless cessation was ordered by his business agent. Lang attempted to contact the business agent, and then went to the Union hall, which he opened for the employees. Lang then directed Light to "see whether he could negotiate with [the Operating Engineers] to get them off the bridge." (Pet. App. A-34 to A-35.)

When Lang returned to the jobsite, he was advised by petitioner's officials that he had "a particular obligation" as a Union official to cross the picket line. Lang explained, however, that it was the "consensus" of the employees not to cross until the picketing ceased and stated that he "felt it was better" if he "stayed out" so he could "at least negotiate with the pickets." Light had a similar exchange with petitioner's officials. (Pet. App. A-35.)

In the course of the ensuing "negotiations," an Operating Engineers steward informed Lang that the picket line would be removed if the contractors would cease using the main entrance to the jobsite. Lang relayed this information to petitioner's officials, and they set up a reserved gate for the contractors' employees. Shortly thereafter—at approximately 11 a.m.—the picket line was removed, and Lang, Light, and petitioner's other employees reported for work. (Pet. App. A-33, A-35.)

Subsequently, petitioner disciplined the employees, citing their "failure to report for work as scheduled and participation in an unlawful work stoppage." The rank-and-file employees were given five-day and ten-day suspensions, and warned that "[a]ny future similar action * * * may result in severe disciplinary action, including discharge." (Pet. App. A-33.) Union officials Lang and Light, however, were given

25-day suspensions, and advised that their "participation in any unlawful work stoppage in the future will result in [their] immediate discharge." The reason for the harsher penalties, as explained in the disciplinary notices, was that they had each

> fail[ed] as an elected official of [the Union] to demonstrate to [petitioner] in an objective manner [his] affirmative duty as an elected officer to:
>
> (a) Make every effort to uphold the sanctity of the [collective bargaining] Agreement and its established grievance procedures.
>
> (b) Make every bona fide effort to prevent the unlawful work stoppage.
>
> (c) Make every effort, including returning to work [himself], to end the unlawful work stoppage.

(Pet. App. A-33 to A-34.)

2. On these facts, the National Labor Relations Board (the "Board"), adopting the decision of the administrative law judge, found (Pet. App. A-22, A-43 to A-44) that petitioner violated Section 8(a)(3) and (1) of the Act by imposing harsher discipline on Union officials Lang and Light. The Board rejected petitioner's argument (Pet. App. A-36 to A-38) that their status as Union officers invested Lang and Light with a higher degree of responsibility under the no-strike agreement that would justify the disparate treatment. Following its decision in *Precision Castings Co., Division of Aurora Corp.*, 233 N.L.R.B. 183 (1977), the Board concluded (Pet. App. A-40 to A-41) that such disparate treatment was "discrimination * * * directed against the employees on the basis of their holding union office"

and was therefore prohibited by the antidiscrimination provisions of the Act.[3]

Nor, in the Board's view, was a different result required by two arbitration decisions adduced by petitioner, each of which had construed an earlier collective bargaining agreement with the Union and each of which had concluded that stewards could properly be given "more severe penalties" if they failed to make "bona fide efforts" to halt work stoppages (Pet. App. A-36 to A-39). The Board indicated (*id.* at A-22 n.1, A-39 to A-40) that deferral to such a reading of the rights of Union officials would be "repugnant to the purposes and the policies of the Act [as construed in *Precision Castings*]" and therefore inappropriate under settled Board policy with respect to the weight to be accorded arbitration

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[3] The Board noted (Pet. App. A-38) that *Precision Castings* had rejected the same argument advanced by petitioner notwithstanding the presence there of an express contractual provision requiring the union to take "all reasonable steps" to halt contractually prohibited work stoppages (233 N.L.R.B. at 183-184). A fortiori, the Board reasoned (Pet. App. A-38), enhanced discipline on the basis of an assertedly higher degree of contract accountability is unlawful where, as here, the contract contains "[n]o such provision[.]"

Member Penello dissented. He disagreed with *Precision Castings* and stated his view that "an employer c[an] lawfully hold a union official to a higher standard of conduct than other employees because of the official's responsibilities under the contract" (Pet. App. A-25). Member Penello added (*id.* at A-26 to A-27) that, although Lang and Light made "good-faith efforts to remove the picket line which was the cause of the work stoppage[,]" the disparate treatment accorded them was proper because of their "refusal to abide by the contract themselves and cross the picket line to go to work."

awards.[4] The Board added (*id.* at A-40; citations omitted) that, "[e]ven assuming" that the statutory right to be free from discrimination based on union office "could be waived" by contract, the mere execution of contracts subsequent to these arbitration awards without some modification of the relevant language could not serve as a waiver of this statutory right. "[T]he Board and the courts have repeatedly emphasized that a waiver [of statutory rights] must be shown by 'clear and unmistakable language,' " and no such language was present in the subject contract (*ibid.*).

Accordingly, the Board ordered (Pet. App. A-22 to A-23 n.2) petitioner to revoke its discipline of Lang and Light, and to expunge their records, "to the extent that it * * * exceeded the discipline meted out to the other employees."

3. A divided court of appeals enforced the Board's order (Pet. App. A-12). Following its decision in *Hammermill Paper Co.* v. *NLRB*, 658 F.2d 155 (3d Cir. 1981), petition for cert. pending, No. 81-1438 (filed Jan. 29, 1982), the court held (Pet. App. A-7 to A-8) that an employer "may not impose greater discipline on union officials than on other participants in [a contractually prohibited] strike" in the absence of an express contract provision "specify[ing] that union officials have some responsibility to try to end an illegal work stoppage[.]" Noting (*id.* at A-3 to A-5) the efforts of Union officials Lang

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[4] In order to encourage the settlement of disputes through arbitration, the Board has long held that it will voluntarily defer to arbitration awards where, among other things, the result reached by the arbitrator is not clearly repugnant to the policies and the purposes of the Act. See, *e.g.*, *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955).

and Light to secure removal of the Operating Engineers' picket line so that the employees would return to work, the court explained (id. at A-9):

> Allowing the discriminatory punishment that [petitioner] imposed on Lang and Light might deter others from seeking union office because of the fear that, if an illegal strike were to occur, one would be put in an untenable position: either obey the company and lose their authority [with the rank-and-file], or follow their own judgment and risk harsher punishment. It is because of this dilemma that we will not interpret a collective bargaining agreement to impose additional responsibilities on union officials absent clear language showing that the union agreed to it.[*]

Finding (id. at A-9 to A-10) that the collective-bargaining agreement contained no such language, the court concluded that the disparate treatment of Lang and Light violated Section 8(a)(3) and (1) of the Act.[*]

The court rejected (Pet. App. A-10 to A-12) petitioner's contention that the absence of any contract

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[*] The court noted (id. at A-9 & n.8) that a union officer who urges the rank-and-file to cross a picket line may lose his credibility and thus whatever control he may exercise over the actions of the membership.

[*] The court observed (id. at A-4, A-8) that this conclusion was consistent with its earlier decision in *Gould, Corp. v. N.L.R.B.*, 612 F.2d 758 (3d Cir. 1979), cert. denied, 449 U.S. 890 (1980), where it sustained the harsher treatment of a union steward who had failed to comply with an express contractual provision requiring union officials to take "positive and evident steps to have those involved [in a violation of the no-strike agreement] cease such activity" (612 F.2d at 760-761 n.4, 762-764).

language placing greater responsibilities on the union officials could be cured by the existence of the two arbitration decisions construing earlier collective bargaining agreements with the Union to "require Union officials to take affirmative steps to end an illegal work stoppage." Noting (*id.* at A-11) that, under settled law, "an arbitrator need not follow previous arbitrations construing the same agreement[,]" the court reasoned (*ibid.*) that

> [i]t follows that[,] when this court is called upon to construe a collective bargaining agreement, it need not follow the previous arbitral interpretation. To bind this court to a contractual interpretation made in a previous arbitral award would not be consistent with what the parties bargained for: arbitration as a dispute resolution process for specific grievances.

The court further observed (*id.* at A-11 to A-12) that, while parties could by contract provide for a contrary rule, the collective bargaining agreement here provided that prior arbitral awards were binding only "for the term of [the] Agreement [under which they were rendered]" and that the awards relied on by petitioner "were made under previous agreements." Finally, the court noted (*id.* at A-12) that the present contract provides that "all Customs and Practices" between petitioner and the Union were "listed" in the agreement, and that the agreement "lists no practice of being bound to arbitrations under previous agreements."

ARGUMENT

1. The decision of the court below—that an employer may not impose greater discipline on union officials than it imposes on other employees for fail-

ing to make "every effort" to halt a contractually prohibited work stoppage, where the contract does not by its terms require such officials to do so—follows the principle adopted by the court in its prior decision in *Hammermill Paper Co.* v. *NLRB*, 658 F.2d 155 (3d Cir. 1981), petition for cert. pending, No. 81-1438 (filed Jan. 29, 1982). That principle has also been accepted by every court of appeals that has addressed this issue (see the Board's Brief in Opposition to *Hammermill*, No. 81-1438, at 9-10).[7] Accordingly, review by this Court is not warranted.[8]

2. Contrary to petitioner's contention (Pet. 10-16), the asserted conflict between the decision below and *Fournelle* v. *NLRB*, 670 F.2d 331 (D.C. Cir. 1982), respecting the weight to be accorded arbitral

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[7] A copy of that brief has been served on counsel for petitioner.

[8] We add only that the court's holding in *Hammermill*—that an employer may not impose greater discipline on union officials in the absence of contractual language specifying that union officials have some responsibility to try to end a contractually prohibited work stoppage (658 F.2d at 163-165)—has even more force where, as here, the union officials made good faith efforts to secure the removal of the picket line which the employees refused to cross. As the Seventh Circuit reasoned in a closely analogous case, the union officials

> did just about everything possible to end a strike which [they] had tried to prevent, except to cross the picket line. To have taken that extra step would have been suicidal to [their] union stewardship and [their] capacity to enforce any provision of the bargaining contract.

C.H. Heist Corp. v. *NLRB*, 657 F.2d 178, 181, 183 (7th Cir. 1981). The court below expressly relied (Pet. App. A-9) on this reasoning.

constructions of a collective bargaining agreement, likewise does not present an issue warranting review by this Court. It is true that *Fournelle* held that a prior arbitration decision, which construed the parties' collective bargaining agreement to permit selective discipline of union stewards who violated the no-strike provision contained therein, was binding on the Board in a subsequent unfair labor practice proceeding arising under the *same* contract notwithstanding the absence of "an express contractual term giving the results of past arbitrations precedential effect" (670 F.2d at 341-345). However, the court found that it was reasonable to conclude that such arbitral stare decisis was intended by the parties in the circumstances of that case.[9] Here, petitioner relies on arbitration awards rendered under a *previous* bargaining agreement, and its present contract contains express provisions that specifically negate any inference that the parties intended earlier awards to have precedential effect under the present agreement.[10]

---

[9] The court noted that the arbitration awards were rendered by a permanent umpire, whose awards have special authoritative force. Moreover, an examination of past decisions of the other umpires selected to decide grievances at the shipyard in question revealed "an adherence to arbitral precedent that is as scrupulous as a court's application of the doctrine of *stare decisis*." Finally, the court emphasized that neither of the *parties* to the contract (*i.e.*, the union or the employer) had challenged the arbitral construction in question; only the steward, who was the charging party in that case, and the Board had made such a challenge. 670 F.2d at 344-345.

[10] As shown at page 8, *supra*, the contract at issue provides for arbitral stare decisis only during the term of the agreement under which the awards at issue were rendered; fur-

Moreover, the question whether a past arbitral award is a binding precedent for determining whether a collective bargaining agreement permits the selective discipline of Union officials for their failure to discharge assertedly higher responsibilities would be relevant under the Act only if the Board were to determine that such an award would constitute a clear and unmistakable waiver of the employees' statutory right not to be discriminated against for engaging in union activity (see page 6, *supra*).[11]

---

ther, the contract provides an exclusive "list" of customs and practices binding on the parties, but makes no mention of any practice of adhering to awards issued under previous contracts. Finally, in the present case, the Union is the charging party and has itself attacked the reading of its officials' duties under the agreement.

[11] A majority of the Board as presently constituted has not, as yet, had occasion to address that question (see Brief in Opposition in *Hammermill Paper Co.* v. *NLRB*, No. 81-1438, at 9, n.11).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NATIONAL LABOR RELATIONS BOARD and LOCAL 563, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Respondents.

OPPOSITION OF RESPONDENT LOCAL 563 TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1664

METROPOLITAN EDISON CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and LOCAL 563,
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Respondents.

OPPOSITION OF RESPONDENT LOCAL 563 TO THE PETITION FOR A WRIT OF CERTIORARI

The petition for a writ of certiorari involves an important question of law concerning the propriety of an employer's decision to single out union officers for discipline for their participation in an illegal sympathy strike, along with other members of their union. However, the Courts of Appeals which have addressed this issue directly have, despite some early uncertainty, attained a fair amount of consensus that such discipline is unlawful under the National Labor Relations Act, absent a waiver of the right against disparate discipline in the collective bargaining agreement. Accordingly, the petition should be denied.

STATEMENT OF THE CASE

Facts

Petitioner Metropolitan Edison Co. ("Met. Ed.") is a public utility that operates an electrical power generating plant at Three Mile Island ("TMI"), near Middletown, Pennsylvania. Its production employees at that

location are represented by intervenor Local 563 of the International Brotherhood of Electrical Workers ("Local 563"). In August, 1977, when the actions giving rise to this proceeding occurred, David Lang and Gene Light were president and vice-president, respectively, of Local 563. Also working at TMI were other employees of Met. Ed. and its contractors and subcontractors who were engaged in the maintenance and construction of the generating facilities.

Before August 30, 1977, construction trades locals that represented workers at TMI had had disputes over the use of out-of-town workers. On each occasion, the particular local involved posted a picket line, which was in turn honored by Local 563 members. On each occasion, Met. Ed.'s supervisors asked Lang to resolve the problem, and on each occasion Lang was able to persuade the picketers to remove their line lest the IBEW members' employment be jeopardized.

These disputes, the last of which occurred on August 4, 1977, caused problems for the union's officers from opposite directions. Management believed that the officers should set an example by crossing the picket line and that the membership would follow their elected leaders. It therefore told the officers that they were legally obligated not only to report to work themselves, but also to see to it that all union members crossed the picket line as well. However, at two union meetings between August 4 and August 30, Lang's efforts to persuade the members to comply with their legal obligations were hooted down. The members shouted at him that anybody who crossed a picket line—especially a union officer—was a "scab," and that in the future nobody should cross them.

On August 30, 1977, the Operating Engineers posted another picket line at TMI. Met. Ed.'s management called Lang at home. At its request, he came to TMI before his scheduled starting time to try to solve the

problem. He and Gene Light spent the next four hours shuttling between the picketers at the two entrances to TMI, management in the plant, and the members gathered at the union hall, trying to resolve the dispute so that Local 563's members would be willing to go back to work.

Although management reiterated its position that Lang and Light should cross the picket line, it also relied on their assistance in resolving the problem. Specifically, Lang and Light found that the picketers would be willing to leave the north entrance, used by Local 563's members, if the employees of all contractors were assigned to the south entrance. They presented this information to Met. Ed., which agreed to the solution and relayed its agreement to the picketers through Lang. Local 563's members thus returned to work four hours late, but before the previous shift was required to leave the generating facility.

Nevertheless, Met. Ed. suspended Light and Lang for twenty-five days, while suspending the other union members who failed to cross the picket line for only five or ten days. Met. Ed. explained that Light and Lang's discipline was based on their participation in the work stoppage and, in particular, on their failure as officers, both to set an example for the other workers by crossing the picket line, and to make other efforts using their official positions to persuade their fellows to report to work. The leaders of the stoppage, on the other hand—those who had denounced Light and Lang as "scabs" and demanded that all picket lines be honored—received the same five or ten day suspensions as did the other participants.

Proceedings Below

1. ***National Labor Relations Board***

Local 563 filed an unfair labor practice charge on January 9, 1978, and on February 27, 1978, the Gen-

eral Counsel issued a complaint against Met. Ed. for having more severely punished Lang and Light because they were union officers, thereby violating sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(3). No objection was made to the basic discipline imposed on all workers who did not report as scheduled, because it was stipulated that the strike was forbidden by the no-strike clause in the collective bargaining agreement. Administrative Law Judge Michael O. Miller found that Met. Ed. had violated the Act, and the Board adopted the ALJ's recommended findings and conclusions. However, it amended the recommended order slightly to assure that only the disparate portion of the suspension—that imposed above and beyond the suspensions given to other participants in the August 30 work stoppage—would be nullified.

The Board agreed that Lang and Light had urged the union's members not to honor the picket line, and that only when it became obvious that this advice would not be followed did they adopt a fallback position, reacting realistically and trying to work out a solution that would persuade the members to return to work. App. 43. The Board also reasoned that this was a stronger case for protecting union officers from discriminatory discipline than some earlier cases. For example, in *Precision Castings*, 233 NLRB No. 35 (1977), where the Board most clearly enunciated the rule against disparate discipline of officers who participate in wildcat strikes, the contract specifically imposed on the union a duty to take affirmative steps to end strikes. Here, by contrast, there was a simple no-strike clause which imposed no specific obligations on either the union or its officers to take any action when union members violated it. App. 38-39. Although the Board recognized that arbitrators had construed the contract to require officers to cross picket lines, it determined that added punishment could only be justified by a showing that the union had waived

the rights of its officers in "clear and unmistakable" language. The Board found not only that there was no such waiver, but indeed that the evidence pointed in the opposite direction. App. 40.

In its legal analysis, the Board reaffirmed its *Precision Castings* ruling in a thoughtful discussion of the consequences of a contrary rule. It began with the observation that the disparate treatment could be explained only by the fact that Light and Lang had exercised their fundamental right to seek and hold union office. Addressing the company's position that it has the right to decide whether or not a particular union officer is performing his functions properly, the Board reasoned that this has two consequences that the Act is designed to prevent. First, union members will be discouraged from exercising their fundamental right to hold union office. App. 41. Second, it will create an imbalance between union and management, each of which must be able to freely choose the persons who act as its bargaining representatives. App. 41-42.

Member Penello dissented. Although he found that Lang and Light had complied with what he considered to be their duty to take an affirmative action to bring illegal strikes to an end, he concluded that there was a special contractual obligation imposed on the union and its officers both to take affirmative action and not to participate in the strike. He based this conclusion not on the arbitral awards which Met. Ed. had emphasized, but rather on his conclusion that, as a matter of law, both obligations are implicit in every no-strike clause. App. 39-40.

2. *Court of Appeals*

Met. Ed. petitioned for review of the Board's order, and Local 501 intervened to defend the order. In a careful opinion by Chief Judge Collins J. Seitz, reported at 701 F.2d 475, the court enforced the Board's order.

The court began its discussion with its own previous decision in *Gould Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979). There a provision in the collective bargaining agreement required, in the event of an illegal work stoppage, that the union *and its officers* take certain specified steps to terminate the strike. The *Gould* court had concluded that discipline of a steward for violating this explicit contractual obligation was not an unfair labor practice. The contractual basis of *Gould* had been emphasized in *Hammermill Paper Co. v. NLRB*, 658 F.2d 155 (3d Cir. 1981), *cert. pending*, No. 81-1438, where the court upheld the Board's finding of an unfair labor practice because of disparate discipline.

Next, the court below considered *C. H. Heist Corp. v. NLRB*, 657 F.2d 178 (7th Cir. 1981), where the court had relied on the absence of a sufficiently specific provision in the collective bargaining agreement in holding that the disparate discipline of a steward was an unfair labor practice. Although the Seventh Circuit had earlier issued a decision addressing a similar issue in somewhat broader terms, *Indiana & Michigan Elec. Co. v. NLRB*, 599 F.2d 277 (1979), the court below noted that *C. H. Heist* had limited the scope of the earlier ruling. 663 F.2d at 482.

The court sought to synthesize the legal principles underlying the decisions to date. If a collective bargaining agreement specifies the steps which officers must take in the event of an illegal work stoppage, then the officers may be singled out for discipline if they do not take the specific steps. If the contract only requires in general terms that officers affirmatively try to end the stoppage, then the officers may not be singled out unless they do not act in good faith. If the agreement does not specify that officers have affirmative obligations, then they may be disciplined only to the same extent as other participants in the strike. Finally, if officers lead the

strike, they may be singled out for that reason. 663 F.2d at 481-482.[1]

The court noted that these principles were consonant with the general rule that statutory rights may be waived only by clear and unmistakable language. Because the holding of union office is the essence of protected activity, discrimination on that basis is unlawful. Inasmuch as the employer must rely on the contract to impose special obligations on union officers, it must therefore show that the right against discrimination has been waived. This, the court held, the employer had failed to do. 663 F.2d at 482-483.

Finally, the court turned to the employer's reliance on two arbitration awards which, construing similar language in previous collective bargaining agreements, had found it "well-established" that union officials have affirmative obligations to end illegal work stoppages. The employer argued that the Board was bound—collaterally estopped, in effect—to find that the contract imposed higher responsibilities on union officers, and that, assuming a waiver analysis was applicable, a waiver had occurred. The court rejected this argument, noting that even an arbitrator need not follow previous arbitrations construing the same agreement, and that the collective bargaining agreement did not specifically provide for such estoppel—rather, it made awards binding only "for the term of this Agreement."

Judge Van Dusen dissented. He quoted a long passage from the court's previous decision in *Gould*, noted that it had, in turn, quoted a portion of *Indiana & Michigan*, and stated that *Gould* had endorsed the broad reasoning of that decision. He would therefore have remanded to the Board for reconsideration in light of *Gould*. A petition for rehearing and suggestion of rehearing *en banc* were denied.

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[1] The court specifically upheld the Board's finding that Lang and Light were not leaders of the strike. 663 F.2d at 484.

REASONS FOR DENYING THE WRIT

I.

There is no question that the Board's *Precision Castings* doctrine, which forbids disparate discipline of union officers for their participation in, or failure to terminate, a wildcat strike, is an important principle of labor law. Section 8(a)(3) of the National Labor Relations Act guarantees workers against discrimination that encourages or discourages them to be active or passive in union activities, to be a leader, a follower, or neither one. *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954). The holding of union office is the very essence of such protected activity, and is therefore a forbidden basis for discrimination *E.g., Cameron Iron Works v. NLRB*, 464 F.2d 609 (5th Cir. 1972); *NLRB v. Gates Rubber Co.*, 493 F.2d 249 (6th Cir. 1974). This is true even if the employer is in no other way anti-union. *Alabama Roofing and Metal Co. v. NLRB*, 331 F.2d 965, 967 (5th Cir. 1964).

An employer may, of course, single out for discipline the leaders of a wildcat strike. *E.g., NLRB v. Armour-Dial*, 638 F.2d 51 (8th Cir. 1981). However, its understandable desire to obtain the benefit of its bargain, by observation of the no-strike clause, does not legitimize its use of a protected activity (holding union office) as a surrogate for the unprotected activity (strike leadership) which it seeks to punish. Use of that surrogate subjects union officers to the very difficult conflict in which they risk losing their authority if they seem to side unduly with the employer, yet risk discipline up to and including discharge unless they act as the employer's agent in seeking to end the strike. The facts of this case graphically illustrate both the tightrope which union officers must walk, and the way in which conscientious officers can, by using independent judgment, help end a work stoppage with minimum damage. Accordingly, the Board has proscribed discriminatory punishment absent strike leadership by the officers.

However, contrary to the claims in Met. Ed.'s petition, the courts of appeals have not "articulated divergent standards" for applying the Act to such discipline. Pet. 17. Rather, they have evolved a consistent approach to the question, followed by the court below. Thus, disparate discipline will be allowed if the collective bargaining agreement imposes affirmative obligations on the officers. But because the validity of the discrimination depends on a contractual waiver, the contract must be found to contain "clear language showing that the union agreed to it."[2]

Petitioner relies on the recent decision of the Court of Appeals for the District of Columbia Circuit to support its claim that there is a split among the circuits. *Fournelle v. NLRB*, 670 F.2d 331 (1982). However, the *Fournelle* court declined to pass on the propriety of discipline absent a contractual waiver, because it found that the parties *had* waived whatever rights there might be through the collective bargaining process. 670 F.2d at 341.[3] Although petitioner objects to the finding that there was no waiver in this case, and points to certain factual similarities between this case and *Fournelle*, the legal analysis in the two decisions, which rely on the presence or absence of a waiver, is consistent and presents no conflict requiring review by this Court.

Finally, petitioner relies on dictum in *NLRB v. Armour-Dial*, 638 F.2d 51, 56 (8th Cir. 1981), in which the court expressed sympathy with the broad reasoning

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[2] This is what the Third Circuit held below, 663 F.2d at 481-483, and as petitioner concedes, at 18, the Seventh Circuit has been developing a similar rule. That position was also adopted by the First Circuit outside the context of illegal strikes. *See Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199, 204 (1st Cir. 1981).

[3] Unlike this case, in *Fournelle* the Board had not considered the waiver issue, and made no finding that there was no waiver. Moreover, in *Fournelle*, the contract did not limit the binding effect of arbitral decisions to the term of the current contract.

of *Indiana & Michigan*. However, that court rested its holding on the fact that the union officers had actively led the strike. This rationale is entirely consistent with Board law and with the decision below.

In sum, although the courts of appeals have not accepted the Board's view that the right against disparate discipline may not be waived, in every circuit where the question has been reached the unanimous view is that such discipline is proper if the parties have specifically waived such protections, but that it is improper absent such a waiver. Moreover, the Board itself appears to be reconsidering the propriety of discipline when there has been a waiver. *See Fournelle v. NLRB*, *supra*, 670 F.2d at 339-340. Thus, although the time may yet come when this Court is required to consider the issue of disparate discipline, it should not do so now.

II.

Petitioner's other question presented for review, whether "the NLRB or a court [may] substitute its interpretation of a collective bargaining agreement for that of an arbitrator", rests on a misconception of the decision below. Contrary to the petition, the court below did not question the fundamental principle that an arbitral decision construing a collective bargaining agreement has *precedential* effect that normally will be honored by a later arbitrator. It held only that the first decision does not bind a second arbitrator, and hence does not bind the Board, in the sense that the parties are required to accept as final the earlier interpretation. The parties are free to argue for a new construction, and the second arbitrator is free to adopt one.

It is thus apparent that, in disregarding the arbitral decisions, the court was not substituting its judgment for the arbitrators; nor was it weakening the precedential effect of their decisions. It simply ruled that, in order for there to be a waiver of a statutory right, the

contract must contain clear language showing the imposition of special duties on union officers. Because the contract did not contain such language, the court held that there was no waiver, and the discipline was unlawful.

Petitioner fails to appreciate that in applying the waiver standard the function of the Board is different from that of the arbitrator. Arbitrators are concerned only with construing collective bargaining agreements which, as petitioner concedes, are inevitably ambiguous in many respects. Pet. 11. The Board, however, does not seek to determine the meaning of an ambiguous provision, for if the provision is ambiguous, then there has been no waiver. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). The arbitrators did not purport to find clear language; Metropolitan Edison does not point to any clear language; and neither the Board nor the Court of Appeals found it.

The petitioner is thus incorrect in its assertion that "the practical effect" of the decision below would be to force the parties to renegotiate every arbitral award to be certain that it does not lapse. Pet. 15. Arbitral awards will continue to have precedential effect concerning economic issues between the parties. If, however, a party wishes to convert an arbitral decision into a waiver of the statutory right against discrimination that encourages or discourages union membership or activity, then it must indeed seek such a waiver openly. Local 563 submits that such a requirement will not "inexorably subvert the collective bargaining relationship", Pet. 16; it will simply ensure that statutory rights—the basis upon which a collective bargaining relationship is built—will not be undermined *sub silentio*.[4]

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[4] As discussed above, at n.3, the difference between the result in *Fournelle* and the result below depends on differences in the collective bargaining agreement and the fact that the Board made a specific finding of waiver in this case.

In conclusion, neither the Board nor the Court of Appeals

> has imposed its own view on what the terms and conditions of the labor agreement should be. [They have] done no more than merely enforce a statutory right . . .. The[ir] interpretation went only so far as was necessary to determine that the union did not agree to give up these statutory safeguards.
>
> *NLRB v. C&C Plywood*, 385 U.S. 421, 428 (1967).

Their treatment of the collective bargaining agreement and of the arbitral decisions neither exceeded their proper role, nor threatens the peaceful resolution of grievances.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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Petitioner's Brief

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NATIONAL LABOR RELATIONS BOARD,
Respondent

LOCAL UNION 563, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Intervenor

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Third Circuit committed error by disregarding, and substituting its own contrary view for, a repeated and clear arbitral interpretation of the parties' collective bargaining agreement imposing special duties upon union officials and approving their selective discipline for violation of a general no-strike pledge?

2. Whether, apart from any prior arbitral decisions, or any specific contractual provision imposing prescribed duties upon union officials, such officials may be selectively disciplined for violation of a general no-strike clause because of a higher responsibility inherent in their positions?

PARTIES IN THE COURT OF APPEALS

The parties in the court of appeals were Metropolitan Edison Company (petitioner below and in this Court), the National Labor Relations Board (respondent below and in this Court), and Local 563, International Brotherhood of Electrical Workers (intervenor below and in this Court).

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

Petitioner, Metropolitan Edison Company,[1] hereby submits its brief on the merits.

OPINIONS BELOW

The Decision and Order of the National Labor Relations Board (PA. 22)[2] finding petitioner guilty of an unfair labor practice, is reported at 252 N.L.R.B. 1030. The Opinion of the United States Court of Appeals for the Third Circuit (PA. 1), enforcing the order of the National Labor Relations Board, is reported at 663 F.2d 478.

1. In accordance with Supreme Court Rule 28.1 Metropolitan Edison states that it is a wholly-owned subsidiary of General Public Utilities Corporation, as are Jersey Central Power and Light Company, Pennsylvania Electric Company, General Public Utilities Service Corporation and GPU-Nuclear Corporation.

2. References cited as "PA.," followed by the page number, are references to the appendix to the Petition for Certiorari filed by Met-

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1981. (PA. 50). Petitioner's request for rehearing en banc was denied by order of the court of appeals entered on January 5, 1982. (PA 51).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISIONS

National Labor Relations Act:

Section 8(a)(1), 49 Stat. 452 (1935), 29 U.S.C. §158(a) (1) (1976):

> "(a) It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7;
>
> . . . ."

Section 8(a) (3), 49 Stat. 452 (1935), 29 U.S.C. §158(a) (3) 1976 [in pertinent part]:

> "(a) It shall be an unfair labor practice for an employer —
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
>
> . . . ."

NOTE 2 — *(Continued)*

ropolitan Edison in this case. Under Supreme Court Rule 30.1, the portions of the record contained in the appendix to the Petition for Certiorari have not been reproduced in the Joint Appendix. References herein to the Joint Appendix are "JA.," followed by the page number. References to Metropolitan Edison's trial exhibits which are not reproduced in either appendix are "RX," followed by the exhibit number.

STATEMENT OF THE CASE

On August 30, 1977, the Three Mile Island nuclear power station was the scene of a labor dispute during which 137 Metropolitan Edison Company ("Metropolitan Edison" or "the company") employees refused to cross a stranger picket line and report for work. All of them were suspended for that refusal which was stipulated to have been in breach of the governing labor agreement. Local Union President David Lang and Vice-President Gene Light were suspended for a longer period than the others for their roles in the unlawful work stoppage. The National Labor Relations Board ("NLRB" or "Board") ruled that the more severe punishment of the union officials contravened Section 8(a) (1) and (3) of the National Labor Relations Act ("NLRA"), 49 Stat. 452 (1935), 29 U.S.C. §158(a) (1) and (3) (1976). Notwithstanding arbitration awards under petitioner's collective bargaining agreement permitting selective discipline of union officials in similar circumstances, and notwithstanding the conduct of Lang and Light during the unlawful work stoppage, the United States Court of Appeals for the Third Circuit enforced the Board's order pursuant to its jurisdiction under 29 U.S.C. §160(e) and (f) (1976).

BACKGROUND—LABOR RELATIONS SETTING

Metropolitan Edison is a public utility providing electricity to 300,000 customers in Southeastern Pennsylvania. (JA. 25). For labor relations purposes, it is divided into five regions, with a separate local of the International Brotherhood of Electrical Workers ("IBEW") representing the production employees in each region. Together, the locals, including Intervenor Local Union 563, IBEW ("Local 563") form a System Council which is the exclusive bargaining representative for a single, systemwide bargaining unit of approximately 1,600 employees. (JA. 25-26). One labor agreement governs the

entire unit. (JA. 26; RX No. 1 at 9). In that contract, the parties agreed to a no-strike, no-lockout commitment which remained unchanged at all relevant times:

> The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood and its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public.

(RX No. 1 at 46-47).

Despite that pledge, on several occasions from 1970 until August 30, 1977, employees at individual facilities covered by the agreement engaged in forbidden work stoppages. The work stoppages took place in 1970, 1972, 1973, 1974 and on August 4, 1977. In each instance, except the last, the company disciplined the union officials among the violators more severely than the rank-and-file employees involved. (JA. 29-30, 32, 34, 38-39).

A. *Work Stoppages 1970-1974.*

In 1970 a number of employees refused to report for work when scheduled. Ninety of them received warnings and the union officer involved was suspended for one day. (JA. 29).

In 1972, four employees were suspended for refusing to cross an informational picket line posted by building trades unions at a motel construction site. (JA. 6; JA. 29-30). The following day, approximately two hundred employees, including three union officials, protested by refusing to begin work. While the rank-and-file employees involved received written warnings, the union officials were suspended for three days on the grounds that they had a greater responsibility to honor the contract. (JA. 6; JA. 29-30, 31; PA. 54-55). The day after the mass protest, six other employees refused to cross the picket line at the motel and were also suspended. (JA. 6).

The disciplinary action resulted in two arbitrations: Arbitrator S. Stanley Alderfer upheld the penalties imposed on the rank-and-file employees, holding, *inter alia*, that the no-strike clause barred sympathy strikes (JA. 11-12); Arbitrator Wayne E. Howard heard the grievance regarding the union officials' discipline and decided that "the more serious discipline assessed against the grievants by reason of their union position was proper" (PA. 58).

In sustaining the more severe penalty, Arbitrator Howard ruled that under the collective bargaining agreement the three union officials stood in a position different from that of other employees and had "an *affirmative duty* . . . to uphold the sanctity of the Agreement and its established grievance procedures. Failure to exercise this responsibility subjects them to more serious penalties." (PA. 60) (emphasis original; footnote omitted). Arbitrator Howard concluded that the grievants had failed to exert "every effort to halt the stoppage at the outset" and, more importantly, "*failed to demonstrate to the Company during the course of the stoppage that they were making such an effort.*" *(Id.)* (emphasis original). Instead, he found that they had tried to bargain concessions from the company in exchange for an end to the walkout. Finally, he held: "Indeed, the mere *participation* by union leaders in an illegal work stoppage is sufficient to justify a differential penalty, particularly where, as here, the differential penalty, a three-day disciplinary layoff, was of relatively little magnitude." *(Id.)* (emphasis original).

In October, 1973, all of the union employees at Three Mile Island engaged in an illegal three-day strike. (JA. 32, 91). The rank-and-file employees were given five-day suspensions, later reduced to one day. (JA. 32). The union officials involved, including Lang and Light, for the same reasons that a more severe penalty was imposed in the instant case, were given twenty-five-day suspensions, later reduced to five days. (JA. 14-17; JA.

32). Although the union challenged two other instances of discipline arising out of the 1973 strike, it did not challenge the greater punishment meted out to Lang and Light and the other union officers. (JA. 32-33, 92). According to Lang's testimony, the Executive Board members met regarding the discipline and "[looked] for cases to take to arbitration and we found two of them that we liked and those we took and the rest of them [including his own and Light's] we just did not pursue any further." (JA. 92).

In 1974, the company disciplined sixty-five employees for a contractually forbidden strike. Fifteen employees, for whom it was the first such violation, received written warnings. Forty-seven others were given one-day suspensions because they had been involved in a previous illegal stoppage. Three union officials were suspended for three days. (JA. 34; PA. 62). The more severe discipline for the union leaders was challenged before Arbitrator Jacob Seidenberg who sustained the penalty for one of the grievants, a senior shop steward, but reduced the discipline of the other two because, unlike the steward, they had tried to induce employees to return to work. (PA. 70, 71-72). Arbitrator Seidenberg concluded as to the steward that he "exercised no firm leadership role," that he "did not, of his own initiative, direct the men collectively to go into the plant to carry out their job duties" and that his conduct "was passive and ineffective and the company could properly determine that he was guilty of failing to meet his responsibility as a senior Shop Steward to secure compliance with a significant and meaningful contract provision." (PA. 70-71). The harsher sanction imposed upon him was, therefore, permissible and not discriminatory.

B. *August 4, 1977 Work Stoppage at Three Mile Island and Aftermath.*

On August 4, 1977, the Pipefitters Union picketed the access point to Three Mile Island reserved for Metro-

politan Edison's employees.[3] (JA. 38, 84, 99). Most of the company's employees, including Lang and Light, refused to cross the picket line. (JA. 38, 82-84, 99-101). In August, 1977, Lang was President of Local 563 and Chairman of the System Council (JA. 80); Light was Vice-President of the local(JA. 99). Company officials informed the employees that they were violating the no-strike clause and directed them to report for work. Despite requests from the company that they do so, neither Lang nor Light instructed or attempted to persuade the employees to report and comply with the collective bargaining agreement. (JA. 83, 99-101). Instead, Lang, accompanied by Light, spoke with the pickets and contacted the Pipefitters business agent in an effort to have the pickets leave the North Gate. (JA. 83-84, 100). Approximately two hours after the Metropolitan Edison employees were to report, the picket line was removed, or at least dramatically reduced in size. (JA. 47-48, 84). Only at that point did Lang tell the employees that they "were going to go into work," because the picket line was coming down. (JA. 84, 101). The employees who reported promptly at that time, including Lang and Light, were not disciplined. Those who reported later were given a disciplinary warning. Employees who did not report at all received suspensions which varied according to whether they had previously participated in an illegal stoppage. (JA. 38-39).

Recognizing that there had been some confusion among its employees on August 4 as to their contractual obligation to report for work when the North Gate was picketed by another union, Metropolitan Edison made special efforts during the ensuing weeks to inform them

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3. At that time one-half of the nuclear electric generating facility was in commercial operation and the other half was still under construction. (JA. 36-37). The North Gate was designated for Metropolitan Edison's use and the South Gate as the entrance for the prime construction contractor and its subcontractors pursuant to the reserved gate system that had been established. (JA. 38, 44).

of their responsibilities. (JA. 39). In particular, Lang and Light were reminded on at least four occasions within that period that they and all employees had a duty to cross any future picket line and that any failure to do so, or at least to make an attempt, would be a breach of the no-strike clause (as previously interpreted by Arbitrator Alderfer). (JA. 39, 40, 74-75, 86-87, 102). Lang and Light were also reminded that, as union officials, they had a special duty to uphold the labor agreement and, if necessary, to set an example for the other employees by reporting for work (as recognized by Arbitrators Howard and Seidenberg). (JA. 40, 71-72, 87, 102). Lang, however, pointedly stated that he would not cross any picket line. (JA. 40).

During that same period, at union membership meetings the consensus was that no employee would cross a picket line in the future. (JA. 86, 88, 91, 94-96). Lang instructed the employees to report to the union hall in that event. (JA. 86, 96).

THE CULIMINATING INCIDENT — AUGUST 30, 1977 WORK STOPPAGE AT THREE MILE ISLAND

Against this backdrop, with which the principal players, Lang and Light, were completely familiar, the events of August 30 unfolded. On that date, at approximately 6:00 a.m., the Operating Engineers Union established informational picket lines at both gates to Three Mile Island in connection with its dispute with a contractor on the site. Most of Metropolitan Edison's first shift employees, including Lang and Light, refused to report for work. General Counsel for the Board stipulated (JA. 21, 22, 113) that this action unlawfully breached the collective bargaining agreement, which Lang and Light had executed as the sole signatories for Local 563 (RX No. 1 at 48).

Throughout the morning, company representatives urged and even implored Lang and Light to direct the employees to report for work and to report for work themselves. They refused. (JA. 53-57, 64-65, 88-89). At one point Lang actually countermanded a company manager's instructions to an employee that he report for work. Lang told the employee either, "Go to the union hall," (JA. 73, 76-77, 78), or "You know what you are supposed to do," (JA. 88). In either case, the employee immediately drove to the union hall. (JA. 73, 88).

Finally, the two union officials were explicity warned that they would be in serious trouble if they did not instruct the employees to report and do so themselves. (JA. 60, 71, 104). Still, they repeated their unvarying response, even in front of a large group of bargaining unit members that neither they nor the other employees would report for work as long as the picket line remained at the North Gate. (JA. 55-56).

In a moment of candor, Lang vounteered to a company manager that were he to cross the line, the Operating Engineers (the pickets) would not honor any picket line the IBEW might erect the following year if it struck Metropolitan Edison. (JA. 53-54).

Rather than attempting to persuade the employees to report for work and abide by their collective bargaining agreement and doing so themselves, Lang and Light confined their efforts to inducing the Operating Engineers to leave the North Gate, even in the face of the company rejecting those efforts. (JA. 56-57, 65, 69, 70, 89, 96-98, 102-04). At one point, Light declined a company manager's urging that he report for work, saying that he was trying to get the pickets removed. The manager responded: "That does not matter. Come to work now." Light ignored this entreaty and promptly got into his truck and drove toward the union hall. (JA. 56-57).

Ultimately, at 11:00 a.m., the Operating Engineers ceased picketing after the company agreed to confine

the contractors to the South Gate. (JA. 66-67). Only after the pickets left the North Gate did Metropolitan Edison's employees report for work. (JA. 90-91, 115).

After reviewing the conduct of all the employees involved, the company imposed varying measures of discipline. One hundred twenty-one first offenders received five-day suspensions and fourteen repeat offenders received ten-day suspensions. (R. 36). The two union officials, Lang and Light, received twenty-five-day suspensions. The enhanced penalty was based on their own failure to honor the contract, and on their participation in the 1973 work stoppage. (JA. 16, 17; JA. 41-42). In assessing the longer suspensions to Lang and Light, the company notices tracked the awards of Arbitrators Howard and Seidenberg by citing the union officials for having failed (1) to "make every effort to uphold the sanctity of the Agreement and its established grievance procedure," (2) "to make every bona fide effort to prevent the unlawful work stoppage," and (3) "to make every effort, including returning to work yourself, to end the unlawful work stoppage." (JA. 16, 17; PA. 60).

THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD

Adopting *in toto* the decision of Administrative Law Judge Michael O. Miller, a majority (then-Chairman Fanning and Member Jenkins) found Metropolitan Edison to have unlawfully discriminated against Lang and Light because of their union positions by more harshly disciplining them for their participation in the August 30, 1977 work stoppage. (PA. 22). The majority reaffirmed the rule announced by the Board in *Precision Castings Co.*, 233 N.L.R.B. 183 (1977), making it *per se* unlawful to discipline union representatives more severely than rank-and-file employees for participating in a contractually barred work stoppage, even if the contract requires affirmative action on their part to end such a

supra, (PA. 22 n.1). It found further, assuming *arguendo* that the parties could by contract waive the Section 8(a)(3) rights of union officials, that such waiver must be achieved by "clear and unmistakable language" which was not present here (and could not be furnished by the arbitration awards). (PA. 40).

Member Penello strenuously dissented, stating that there are "duties and responsibilities" which are "inherent" in a union official's position, the foremost of which is the enforcement of a no-strike clause. He further observed that union officials are "natural leaders" in any strike situation and, therefore, may be more severely disciplined. (PA. 25-26).

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals for the Third Circuit affirmed the result reached by the Board, but did not adopt the Board's *per se* approach, having previously rejected the *Precision Castings* rule in *Gould, Inc. v. NLRB*, 612 F.2d 768 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980). Instead, the court held that the parties' collective bargaining agreement must expressly impose on union officials a duty to take affirmative steps to end a strike before such officials may be more severely penalized than other illegal strikers because they fail to take such steps. It proceeded on the basis that a Section 8(a)(3) violation could be avoided in such circumstances only if the statement of the union officials' obligation satisfies the "clear and unmistakable language" standard used for assessing waivers of statutory rights. (PA. 8-10).

In reaching that conclusion, the court rejected the awards of Arbitrators Howard and Seidenberg as capable of providing the requisite expression of the added burden on union officials, finding that those awards did not constitute part of the collectively bargained arrangement. (PA. 10-12).

SUMMARY OF ARGUMENT

The Third Circuit's decision in this case gives short shrift to the cornerstone of the national policy in favor of industrial stability and against labor strife, namely, the congressional mandate that the parties should resolve labor disputes peacefully through procedures to which they have agreed. Section 203(d) of the Labor Management Relations Act ("LMRA"), 61 Stat. 153 (1947), 29 U.S.C. §173(d) (1976). This Court in the *Steelworkers Trilogy*[4] established the primacy of the grievance-arbitration process and in subsequent decisions fortified it so that arbitrations and no-strike provisions of labor agreements have become the centerpiece of collective bargaining. Here, however, the court of appeals, in an unaccountable lapse, directly subverted that bedrock policy. The court expressly substituted its own, contrary interpretation of petitioner's contract for a longstanding, repeated arbitral construction which held union officials to special obligations in the event of a contractually-barred work stoppage.

Local Union President Lang and Vice-President Light disregarded their special responsibility on August 30, 1977 when they participated in an unlawful strike at the Three Mile Island nuclear power station. Although they had previously been singled out and more severely punished for similar misconduct in the past, they refused to cross another union's picket line to report for work and refused to direct other employees to report, instead instructing them to go to the union hall. They admittedly did so at least in part to gain the support of that union and a tactical advantage in their future negotiations with petitioner. Their uninvited efforts to secure the removal of the picket line as the stated precondition for petitioner's employees reporting for work served only

4. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

to reinforce among those employees the notion that they were justified in breaching the no-strike clause. For this breach of their duties as union officials, Lang and Light were more severely disciplined than others who participated in the strike.

A. The *per se* rule applied by the NLRB in this case, which it announced in *Precision Castings Co.*, 233 N.L.R.B. 183 (1977), and *Gould Corp.*, 237 N.L.R.B. 881 (1978), *enforcement denied*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980) — that union officials may not be more severely penalized than rank-and-file employees merely for participating in an unlawful strike — has been flatly rejected by each of the four circuit courts of appeals which has reviewed it, although the standards adopted by them differ. The Third,[5] Seventh,[6] and District of Columbia[7] Circuits require some contractual basis for holding union officials to a higher duty to honor and to seek compliance with a no-strike commitment. The Eighth Circuit[8] has intimated in dictum that there need be no such contractual foundation, but that as a matter of law union officials have such added duty for breach of which they can be selectively disciplined.

B. The contractual basis here for selectively disciplining union officials is furnished by two arbitration awards which determined that under petitioner's collective bargaining agreement union officials must take affirmative steps to obtain employee compliance, and to comply themselves, with the no-strike clause. If they fail to do so

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5. *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 163-64 (3d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3622 (U.S. Feb. 9, 1982) (No. 81-1438); *Gould Inc. v. NLRB*, 612 F.2d 728, 733 (3d Cir. 1979), *cert denied*, 449 U.S. 890 (1980).

6. *C.H. Heist Corp. v. NLRB*, 657 F.2d 178, 182-83 (7th Cir. 1981); *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227, 232 (7th Cir. 1979).

7. *Fournelle v. NLRB*, 670 F.2d 331, 341-45 (D.C. Cir. 1982).

8. *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 55-56 (8th Cir. 1981).

they may be selectively penalized. The Third Circuit erred grievously in refusing to recognize as an integral part of the labor agreement the consistent arbitral construction which emanated from those cases which are factually indistinguishable from the case at bar. In particular, it violated the clear instruction in *Warrior* that the determinations of arbitrators are "part and parcel of the collective bargaining process," 363 U.S. at 578, and, hence, of the agreements they construe, and help form the industrial common law to which the parties must conform their conduct. 363 U.S. at 579-80, 581-82.

The reasoning by which the Third Circuit sought to justify dismissing the arbitral interpretation is invalid or inapposite. First, the court mistakenly concluded that since an arbitrator is not absolutely bound to follow previous arbitrations construing the same contract language, *a priori* when a court "is called upon to construe a collective bargaining agreement, it need not follow a previous arbitral interpretation." (PA. 11). This premise is incorrect (1) because arbitrators customarily follow the principles set forth in past awards unless the contract has changed, (2) because the Third Circuit in reviewing the Board's order in the instant case had no occasion "to construe" the labor agreement — the arbitrators had already done precisely that, and (3) because, as the *Trilogy* makes abundantly clear, the parties to a labor agreement have bargained not for a court's construction of the contract but for an arbitrator's. In these circumstances the circuit court had "no business" invading the province which the parties had reserved for an arbitrator. *Enterprise Wheel*, 363 U.S. at 599.

Second, in support of its initial premise the court incorrectly deemed the effect of the prior arbitration awards to be confined to the particular grievances they resolved. (PA. 11). A leading authority on labor arbitrations has observed that an arbitral interpretation "becomes a binding part of the agreement and will be ap-

plied by arbitrators thereafter." F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 377 (3d ed. 1973) (footnote omitted). Moreover, collective bargaining realities are such that parties do not submit grievances to arbitration expecting merely to resolve the individual case. Rather, they do so in order that labor experts can provide meaning to their contract and guidance for proper conduct in the future. Otherwise, the same issue could be interminably resubmitted, thereby fostering unending labor unrest.

Third, although the court would accord greater precedential effect to arbitration awards if the parties so provided in their agreement, it concluded that petitioner's contract did not go far enough for it to be bound by the arbitral construction at issue here. (PA.11-12). The short answer is that the court's fundamental notion as to the limited impact of arbitration awards is mistaken and specific contract language expanding their effect is not necessary. Indeed, in this case the second of the two arbitrators who addressed the issue of union officials' responsibilities during illegal strikes followed the first arbitrator's interpretation. Moreover, where, as here, the parties have renegotiated their agreement at least twice without attempting to void or modify the arbitral interpretation, that construction is properly viewed as having been accepted by them as part of their bargain. *See Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 222 (1979).

The error of the Third Circuit in rejecting the arbitration awards as part of the labor agreement is pointedly demonstrated by the decision in *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982). In direct conflict with the Third Circuit here, the District of Columbia Circuit ruled that arbitral determinations are "as important a source of rights and obligations of the parties as the contractual document itself." *Id.* at 344. The *Fournelle* court deemed an arbitrator's imposition of special responsiblities on union officials during an unlawful strike and his approval of selective discipline to be part of

the collective bargaining agreement. Hence, the arbitration awards here satisfied any possible need for a contractual basis for holding union officials to a higher standard of compliance with a no-strike pledge. Because of their clarity and their acceptance by the parties the awards satisfied the "clear and unmistakable language" test which the Third Circuit suggested is appropriate.

C. Assuming arguendo that a special duty has not been contractually imposed on union officials to follow and enforce a no-strike pledge, such added responsibility is inherent in their positions. Selective discipline is therefore permitted for a breach thereof. This view is supported by Board law prior to *Precision Castings*, longstanding arbitral law, and the dissents of Member Penello here and in *Gould*.

Member Penello observed that the natural counterbalance to the more favorable treatment accorded union officials in the collective bargaining setting are accompanying duties and responsibilities also not shared by the rank and file. The foremost of these obligations is enforcement of and adherence to a no-strike commitment. Member Penello also recognized that the nature of a union official's position automatically invests him with a special authority in the eyes of his fellow employees. Thus, it is essential that union officials lead by both persuasion and example because their failure to "follow the rules" has a more serious, mushrooming impact than such a failure by other employees.

Breach of their special standard of conduct subjects union officials to disciplinary action over and above that imposed on other employees who do not share that responsibility and, therefore, are not similarly situated. There is no violation of Section 8(a)(3), because the requisite discrimination is not present — there is no disparate treatment of like cases in these circumstances. *Radio Officers v. NLRB*, 347 U.S. 17, 42-43 (1954); *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 747 (5th Cir. 1979). This result is also consonant with this Court's recogni-

tion in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957), that the no-strike pledge is the quid pro quo for the employer's agreement to arbitrate grievances — the foundation of harmonious labor-management relations. If employers cannot effectively enforce a no-strike clause and get the benefit of their bargain, the use of arbitration will inevitably be jeopardized with consequent peril for industrial peace throughout the nation. Selective discipline of union officials for violation of a no-strike clause, rather than uniform discipline of hundreds or even thousands of violators, is the only practical and effective remedy available to the employer to productively resume its operation and preserve the pivotally important no-strike commitment. The Third Circuit's frail concern for internal political problems which may confront union officials under the instant circumstances pales in comparison with concerns more vital to the country's industrial stability.

ARGUMENT

I. Four Circuit Courts Properly Have Rejected the Board's *Per Se* Rule that Union Officials Have, in Effect, Unwaivable Rights Insulating Them Against Selective Discipline for Breach of a Contractual No-Strike Clause.

To date, the four courts of appeals which have reviewed the Board's *per se Precision Castings* rule have summarily rejected it. In so doing, however, the courts have been inconsistent in the tests they have adopted.

The Third Circuit, in *Gould* and *Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 163-64 (3d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3622 (U.S. Feb. 9, 1982) (No. 81-1438), has taken the position that a union official may be held accountable for breaching a higher duty to uphold a no-strike agreement only where that duty arises out of the collective bargaining agreement. Here, the Third Circuit narrowed its view by refusing to recognize such additional responsbility unless it is set forth in *explicit* contract language; the fact that such duties have been found to exist and have been enforced by consistent arbitral decisions under the parties' agreement is not considered sufficient by that court.

The Seventh Circuit initially took a more expansive view, suggesting that, by operation of law, union officials are chargeable with a higher duty to honor contractual commitments, in particular a no-strike pledge. *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227, 232 (7th Cir. 1979). More recently, in *C. H. Heist Corp. v. NLRB*, 657 F.2d 178, 182-83 (7th Cir. 1981), a panel of that court appeared to move toward the position that at least some basis in the labor agreement must exist for holding union officials to a more stringent standard.[9]

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9. In *Heist*, the Seventh Circuit, in an attempt to reconcile its two decisions, cited language in the *Indiana & Michigan Electric* labor agreement (that because the employees' services were essential to operation of a public utility, they would not be "called upon or

Currently, among the courts of appeals, the Eighth Circuit has assumed the broadest view, stating in dictum that the greater responsibility of union officials to adhere to and affirmatively uphold labor agreements is inherent in their status. As a result, they may be held to that standard, even absent a specific contractual derivation for it. *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51 (8th Cir. 1981).[10]

The District of Columbia Circuit, in *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982), concurred with the Third Circuit that additional responsibility may be imposed on a union official through collective bargaining. But, of critical importance for our purposes, the District of Columbia Circuit departed from the Third Circuit by accepting arbitral interpretations of a labor agreement as furnishing the necessary contractual touchstone. *Id.* at 341-45.

The District of Columbia Circuit also observed that the Board's position "ignores the principle that a valid waiver of an employee's right to engage in concerted activity renders such activity unprotected by the NLRA." *Fournelle*, 670 F.2d at 339 n.16. The court found that,

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permitted" to strike), as furnishing a contractual basis for selectively disciplining individual union officials. *Heist*, 657 F.2d at 182. The contract language in *Heist* was only marginally less nebulous ("The steward's duties shall consist of seeing that all terms and conditions of the Agreement are being complied with . . ."). *Id.*

Metropolitan Edison's agreement contains language at least as strong in Article XII §12.2: ". . . the International Brotherhood pledges its utmost good faith to the end that the terms of this agreement . . . shall be strictly observed." (RX No. 1 at 47). Presumably, the Seventh Circuit would view that provision as sufficient authorization for the selective discipline of the union officials here.

10. Although the Eighth Circuit couched its conclusion in terms of the union officials involved having "acted in concert" with their president who "fomented the illegal work stoppage," a careful reading of the facts in the opinion reveals the actual conduct of such officials to have been limited to sitting by silently while the president threatened a work stoppage. *Armour-Dial*, 638 F.2d at 53-54, 55.

since rank-and-file employees may be discharged for disobeying a contractual no-strike clause (which waives their right to strike under Section 7 of the NLRA, 49 Stat. 452 (1935), 29 U.S.C. § 157 (1976), "there is no reason why a valid provision waiving the rights of union officials should have any different effect." *Id.*

In its decision (PA. 40) and in its Brief opposing the grant of certiorari (at 6, 11), the NLRB has taken the position that the statutory right involved here is the right to be free from discrimination under Section 8(a)(3). It is mistaken. We are not here faced with a direct nullification of any such right. The arbitrators did not rule that under the agreement Metropolitan Edison could discriminate against union officials simply because of their status. Rather, they found union officials to have obligations with respect to the no-strike pledge beyond those of ordinary employees. The union officials who participate in an unlawful strike are therefore guilty of a more serious offense; their wrongdoing is greater than that of other strikers. Being more culpable, under universally accepted principles of discipline applied by the Board, they are subject to greater penalties. *See, e.g., Midwest Precision Castings, Inc.*, 244 N.L.R.B. 597, 598-99 (1979); *Chrysler Corp., Dodge Truck Plant*, 232 N.L.R.B. 466, 475, (1977); *J. P. Wetherby Construction Co.*, 182 N.L.R.B. 690, 695 (1970).

As a result, the situation is not one of distinctions between similarly situated employees based solely on the status of some as union officials. It is, instead, one of separate treatment based on their differing quanta of responsibility and culpability. Thus, union officials and ordinary employees are no longer comparable for purposes of assessing discrimination under Section 8(a)(3) because they are not similarly situated. Properly stated, the question, then, is not whether there has been a waiver of a statutory right as such, but rather, whether the imposition of additional obligations on union officials, which moots the 8(a)(3) inquiry, must nevertheless satisfy the

waiver standard of "clear and unmistakable language." If it must, a subsidiary question arises: Must that clear and unmistakable language appear in the contract document or may it be furnished by a consistent arbitral construction of the agreement which remains unchanged by the parties?

Even if one accepts the Board's approach and concludes that the issue must be analyzed in terms of a waiver of statutory rights, it is clear that such a waiver can (and did) occur in the circumstances of this case.[11] As the District of Columbia Circuit observed in *Fournelle*, the rights of union officials, being "in the economic area," *see NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974), may be waived in collective bargaining. The court reasoned:

> The parties to a collective bargaining agreement may seek to increase the effectiveness of a no-strike clause by providing for heightened efforts on the part of union officials to avoid or reduce the disruptive effects of strikes during the contract term. Provision of harsher penalties for union officials who disobey these duties may spur union officials to honor those duties. Allowing the parties to give effect to such contractual terms furthers the strong national labor policy of substituting peaceful dispute resolution for industrial strife, and the equally strong policy of freedom of contract. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107 (1970). Thus, the Board should not attempt in this area to meddle with the legitimate product of the collective bargaining process.

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11. In its decision in *Gould*, the Board implicitly ruled that the rights of union officials here are not waivable. *But see Armour-Dial, Inc.*, 245 N.L.R.B. 959, 960 n.8 (1979), *enforcement denied*, 638 F.2d 51 (8th Cir. 1981). *See also Fournelle*, 670 F.2d at 339-40.

Fournelle at 340-41.

The *Fournelle* court also noted that under collective bargaining agreements, one group of employees may lawfully be treated differently from another group. *Id.* at 341 (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953)). As an illustration, the court pointed to *NLRB v. Wilson Freight Co.*, 604 F.2d 712 (1st Cir. 1979), *cert. denied*, 445 U.S. 962 (1980). There, the contract restricted the power of union officials to use other than the specified channels for raising greivances. Such a restriction on the rights of union officials was found to be permissible "in order to lessen the danger of wildcat strikes and work stoppages and smooth the process of collective bargaining." *Id.* at 726. That being the case, there is no reason why, rather than restricting the exercise of a right, the parties, through the collective bargaining process, may not impose certain additional obligations, where in both instances the effect is a heavier burden on union officials than on rank-and-file employees. There is no practical or logical difference.

Whether union officials may be selectively disciplined by operation of law, as suggested by Board Member Penello and the Eighth Circuit, or whether there must be an underpinning for such action in the collective bargaining compact, as held by the Third and District of Columbia Circuits, it is clear that the Board's *per se Precision Castings* rule is ill-conceived and represents an incorrect application of Section 8(a)(3).

II. The Third Circuit Flouted the *Steelworkers Trilogy* by Refusing to Defer to Prior Arbitral Decisions Construing the Labor Agreement and to Recognize Their Interpretation as an Integral Part of the Agreement.

In its decision below, the Third Circuit held that, in order to be valid, the manner in which added responsibility is imposed on union officials must satisfy the test for a waiver of statutory rights, i.e., it must be "clear and unmistakable." (PA. 8). This, the court determined, can

occur only if there is "clear language" in the contract document itself. (PA. 9-10). Arbitral interpretations of the agreement recognizing such obligations will not suffice. (PA. 10-12).

The court's conclusion palpably ignores Section 203(d) of the LMRA, 29 U.S.C. §173(d) (1976), where Congress established as a fundamental tenet of federal labor policy that the preferred method for resolving disputes under collective bargaining agreements is to be one to which the parties themselves have agreed. With that statutory foundation, this Court has consistently sought to foster and enhance the arbitral process and is largely responsible for its ascendancy. Starting with *Lincoln Mills*, through the *Steelworkers Trilogy*, *Lucas Flour*[12], *Boys Markets*[13], *Gateway Coal*[14] and *Buffalo Forge*[15], arbitration has become the " 'central institution in the administration of collective bargaining contracts,' " *Boys Markets*, 398 U.S. at 252 (quoting Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1557 (1963)).

The question in this case is, as framed by the District of Columbia Circuit in *Fournelle*, which arose in a similar, indeed, virtually indistinguishable factual setting: "whether, on the one hand, the Board and courts should read the agreement in accordance with the clear ruling of the arbitrator or, on the other hand, should substitute their own interpretation for the arbitrator's." 670 F.2d at 344. In answer to its statement of the issue: "whether we are bound by the previous arbitral interpretations," the Third Circuit mistakenly concluded: "We are not." (PA. 11).

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12. *Lucas Flour Co. v. Local 174, Teamsters*, 369 U.S. 95 (1962).

13. *Boys Markets, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970).

14. *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974).

15. *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976).

A. *The Effect of an Arbitrator's Decision Is Not Limited to the Particular Grievance It Addresses.*

Among the points upon which the Third Circuit relied in disregarding the prior arbitral interpretation is its notion that arbitrators are limited to resolving only the particular grievances presented to them; therefore, their decisions are without precedential value or effect absent specific contractual language providing otherwise. (PA. 11-12). One of the leading authorities on labor arbitrations has observed that, in practice, the result is just the opposite: "An award interpreting a collective bargaining agreement usually becomes a binding part of the agreement and will be applied by arbitrators thereafter." F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 377 (3d ed. 1973) (footnote omitted) [hereinafter cited as ELKOURI]. In *Fournelle*, the District of Columbia Circuit wrote: "[I]t is simply inconsistent with the realities of labor arbitration to maintain that without an express contractual term giving the results of past arbitration precedential effect, the arbitrator's rulings are isolated utterances without a general application to the ongoing collective bargaining relationship." 670 F.2d at 344.

Indeed, at the very outset of his dissent in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), Justice Whittaker underscored the impact of the Court's decision as reversing his prior impression of the scope of an arbitrator's authority:

> Until today, I have understood it to be the unquestioned law, as this Court has consistently held, that arbitrators are private judges chosen by the parties to decide particular matters specifically submitted. . . .

363 U.S. at 585-86 (dissenting opinion of Justice Whittaker). The Third Circuit apparently believes that the pre-*Warrior* rule has returned.

It is for good reason that the vitality of arbitration awards extends beyond the narrow bounds of the particular grievances involved. To view them as isolated utterances would undermine the industrial stability arbitration is intended to foster through its function as a peace-keeping mechanism. If arbitration were to be limited in effect, labor unrest would surely be invited with the unsuccessful party being encouraged to raise the same issue again and again, until it got the "right" answer or exhausted itself or the other side. Worse, that view would seriously undermine arbitration as a labor relations pressure valve, leaving it as little more than a temporary respite in an ongoing conflict, rather than "the terminal point of disagreement" envisioned in *Warrior*, 363 U.S. at 581.

Moreover, the reality of collective bargaining is that parties do not submit disputes to arbitration expecting merely to resolve the individual case. They do so to enable labor experts — arbitrators — to give meaning to their contract and in so doing to provide guidance as to its proper administration in the future. For example, in submitting a layoff grievance to an arbitrator, the parties seek to determine not only whether a particular employee or group of employees was correctly laid off, but also, and more importantly, to determine generally and for the future how they are required to proceed under the contractual layoff provisions. Similarly, overtime disputes are arbitrated not merely to establish an individual employee's right to some fixed amount of premium pay, but more importantly, to establish a *principle* for applying the contractual overtime provision. In such cases, the parties do not incur the often high cost of arbitration to question the entitlement of a single employee to a relatively few dollars of pay. In return for their investment, the parties fully intend and expect a permanent, binding resolution of an issue which has long-term general implications.

B. *Courts Are Bound by Prior Arbitral Interpretations of a Collective Bargaining Agreement.*

The basic reasoning utilized by the Third Circuit to sustain its position is deceptively simple: Since an arbitrator need not follow previous arbitrations construing the same agreement, "[i]t follows that when this court is called upon to construe a collective bargaining agreement, it need not follow a previous arbitral interpretation." (PA. 11). This argument, however, cannot withstand scrutiny. First, its premise that arbitrators are not absolutely bound to follow previous awards construing an agreement, while arguably accurate, is, as discussed in the preceding section, not true in practice. *See* ELKOURI, *supra* at 377.

Second, even if an arbitrator may deviate from a previous arbitral award, it does not follow *a priori* that a court may do likewise. Indeed, that proposition flies in the face of a keystone of federal labor policy — the primacy of the collective bargaining process. Thus, the court ignored this Court's warning that the "federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). Moreover, the Third Circuit failed to accord the decisions of Arbitrators Howard and Seidenberg their rightful place as "part and parcel of the collective bargaining process itself." *Warrior*, 363 U.S. at 578. By failing to consider those decisions as a part of the parties' bargain, the Third Circuit disregarded the observation in *Warrior* that arbitration is a "vehicle by which meaning and content is given to the collective bargaining agreement," *id.* at 581, and the means by which gaps which the parties leave in the contract language are filled, *id.* at 580.

That arbitrators, such as Howard and Seidenberg, are expected to supply both flesh and sinew to collective bargaining agreements is also shown by the fact that an arbitrator "is usually chosen because of the parties' con-

fidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." *Id.* at 582. That arbitrators' interpretations of union officials' obligations under a no-strike pledge should govern is reflected by *Warrior's* highlighting that an arbitrator weighs factors such as the "consequences to the morale of the shop, [and] his judgment whether tensions will be heightened or diminished." *Id.* The conclusion that Arbitrators Howard and Seidenberg and not the Third Circuit should be relied upon in this area is further buttressed by this Court's admonition: "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *Id.*

Significantly, the union never brought a court challenge to the Howard award in 1973 or to Seidenberg's in 1975. Nor did the union seek to overturn them in any subsequent contract negotiation or challenge them in a subsequent arbitration. Notwithstanding this obvious acceptance by the union of the arbitrators' interpretation of the agreement as the law of the shop, the Third Circuit has years later approved a wholly collateral attack upon the vitality of their decisions. This action by the court is clearly beyond its very limited authority to overturn an arbitrator's award only upon *direct* review, and, then, only if the award unambiguously fails to draw its essence from the collective bargaining agreement. *Enterprise Wheel,* 597-98.

In a departure from the principles established by this Court, the Third Circuit substituted its own view for that of Arbitrators Howard and Seidenberg and failed to consider their rulings "as important a source of rights and obligations of the parties as the contractual document itself." *Fournelle,* at 690 F.2d 344.

Underlying the foregoing standards is the fundamental principle that arbitration is rooted in contract and

that: "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Enterprise Wheel*, 363 U.S. at 599.

Of course, just as courts may come to realize that one of their prior decisions was in error and overrule it, an arbitrator may conclude that an earlier arbitral interpretation of an agreement was incorrect and he may decline to follow it. *Fournelle*, 670 F.2d at 344 n.22. But that is a power and prerogative which rests exclusively with the subsequent arbitrator because it is his interpretation, and his alone, for which the parties have bargained. *See Enterprise Wheel*, 363 U.S. at 599. Also see *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953), where this Court, reversing the NLRB, accepted an arbitration panel's interpretation of the no-strike clause as an integral part of the collective bargaining agreement and sustained a discharge which was based on that interpretation.

Contrary to the Third Circuit's rationale below, therefore, the fact that an arbitrator has such power does not *a priori* invest a court with equivalent latitude. Very significantly, the Third Circuit cited no authority for its reasoning or conclusion in this regard. The cases it cited for the proposition that an arbitrator may depart from a previous arbitration award emphasize that it is the arbitrator alone who has such authority and not a court. For example, in *New Orleans Steamship Association v. General Longshore Workers*, 626 F.2d 455 (5th Cir. 1980), *aff'd on other grounds sub nom. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, — U.S. —, 102 S. Ct. 964 (1982), the Fifth Circuit said: "Whether there is a 'law of the contract' between the parties once an arbitrator decides an issue and what effect, if any, is to be given precedent are not primarily, if at all, questions for judicial resolution." The question of

precedential value is a matter for the arbitrator to determine. *Id.* at 468.

The NLRB likewise has no more power than a court to substitute its view of a contract for that of an arbitrator. In *NLRB v. C&C Plywod Corp.*, 385 U.S. 421 (1967), this Court stated:

> To have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements. We view Congress' decision not to give the Board that broad power as a refusal to take this step.

Id. at 427-28 (footnote omitted).

C. *Arbitration Awards Rendered Under One Term of the Labor Agreement Are Binding in Subsequent Terms.*

Before the Third Circuit, Local 563 argued that the Howard and Seidenberg decisions could not furnish the contractual basis for imposing special strike-related obligations on union officials because the parties made arbitration awards binding only for a single term of the agreement. The union cited Article IX, §9.2 (4th) which states in relevant part: "A decision made by a majority of the members of . . . a Board of Arbitration shall be binding . . . for the term of this agreement." (RX No. 1 at 45). Although arguing for such a limitation on the arbitration awards here, the union has properly recognized that, at the very least, absent a specific restriction, an arbitrator's contractural interpretation "has *precedential* effect that normally will be honored by a later arbitrator. (Opposition of Local 563 to the Petition for a Writ of Certiorari at 10) (emphasis original).

The Third Circuit, however, took the opposite tack. It did not view §9.2 (4th) to be a limitation on the contin-

ued vitality of the Howard and Seidenberg interpretation. It saw that provision, instead, to be an insufficient *extension* of the impact such a contract construction would otherwise have. In the court's view, described in the preceding sections,[16] an arbitration award has no life beyond the specific grievance it determines, unless the contract provides to the contrary. (PA. 11). To the court, the language of §9.2 (4th) did not breathe life into the arbitration awards for a long enough period of time for them to be controlling in the circumstances here, which arose during a later term of the contract.

Not only is the Third Circuit's perception of the generally limited effect of arbitration awards and contractual interpretations plainly wrong under the *Steelworkers Trilogy*, it fails to recognize that a party may fairly be deemed to accept arbitral interpretations it does not attempt to modify in subsequent contract negotiations. *See Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 222 (1979). "Indeed, the binding force of an award may even be strengthened by such renegotiation without change." ELKOURI, *supra* at 378-79 and cases cited in accompanying nn.49 and 50. Here, two negotiations took place after the first of the two arbitrations without any relevant amendment to the contract being effected or even proposed by the union. (PA. 52, 63; RX No. 1 at 47). As a result, the arbitrators' interpretation thereby became "part and parcel" of the agreement pursuant to *Warrior*, 363 U.S. at 578, and no contractual language specifically recognizing that fact was necessary.[17]

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16. See discussion at 24-29, *supra*.

17. The court below cited a provision in the contract that "all customs and practices" between the parties are to be listed therein. (PA. 11). Suffice it to say that adhering to an arbitration award is not a custom or practice, any more than compliance with any contractual provision is a custom or practice. Being a part of the agreement in the first instance, an arbitral interpretation needs no specific incorporation.

Although the argument initially advanced by the union before the court below merely as a makeweight is fraught with at least as much peril for it as for the company,[18] it or the Board may choose to raise that point again before this Court. There are a number of reasons why that contention fails.

At the outset, we note that neither the NLRB General Counsel nor the union advanced before the Board the claim that §9.2 (4th) limited the effect of the previous arbitral interpretation. Instead, General Counsel countered petitioner's reliance on the prior awards by contending that under the Board's *Precision Castings* and *Gould* decisions the arbitrators' construction is irrelevant: even explicit contract language to the same effect could not justify disparate treatment of union officials and, in any event, the awards cannot substitute for an express provision in the contract document. That position not having been presented to the Board, it should not be advanced and entertained for the first time on review.[19] *See Woelke & Romero Framing, Inc. v. NLRB*, ____ U.S. ____, 102 S.Ct. 2071, 2083 (1982).

Furthermore, a review of the entire agreement reveals that the language in question has been casually interspersed throughout, to the point where it is no more than surplusage which restates the obvious—that pursuant to the termination clause (§12.2) (RX No. 1 at 47),

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18. Obviously, if an arbitration award in favor of the company has no effect beyond a single term of the agreement, awards in favor of the union would be likewise restricted.

19. Had the issue been properly raised at the Board level, petitioner would have had an opportunity to introduce evidence showing that, in fact, the parties have consistently treated arbitration awards as binding with respect to cases arising during subsequent terms of their agreement, the union frequently having agreed to resolve grievances short of arbitration based upon such earlier arbitral awards. Petitioner would also have shown that the union never before claimed that §9.2 (4th) limited the prospective effect of an arbitral decision.

all provisions of the agreement expire at the conclusion of the contract term. Other sections which repeat the same or a similar reference to "the term of this agreement" include those dealing with company recognition of the union (§1.5) (*id.* at 26), layoffs (§§7.8 and 7.10) (*id.* at 41), and transfers from the jurisdiction of one local union to another (§7.9) (id.), as well as the no-strike clause (§11.1) (*id.* at 46).

That §9.2(4th) cannot have the significance the union's argument would accord it is also shown by the grievance and arbitration procedure established in Article IX. There, the parties specified time limits for processing grievances. It is of particular significance that no time limit was provided for the initiation of a grievance and a period of 120 working days was permitted the union for referring a third-step answer to arbitration. (*Id.* at 44-45). Accordingly, it is possible for a grievance not even to be raised until after the term of the contract under which it arose. Certainly, the determination of a grievance arising in the latter stages of the contract would have virtually no life at all. Moreover, it is likely that an arbitration concerning such a grievance would be concluded during a subsequent term of the contract. It is inconceivable that the parties bargained for such fleeting resolutions of their disputes, especially in view of the considerable cost of arbitration.

To so conclude would attribute to the parties the intent that they be compelled to reintroduce in every contract negotiation each arbitral award made during the expiring term of the contract, if they wish to assure themselves that the awards they favor will not lapse and become void. As noted, the general rule is precisely the opposite, with the burden normally being placed on the party who seeks to alter an arbitral interpretation to propose a change in subsequent negotiations. *See* ELKOURI, *supra* at 378-79 and cases cited in accompanying nn. 49 and 50. A failure to do so and to obtain the agreement of the other party results in the awards being incorporated

into the agreement. Such an outcome is entirely consistent, if not demanded, by the national aim of avoiding labor strife.

Moreover, if the parties had consciously intended that §9.2(4th) was to limit the binding effect of arbitral awards, they would not have left it so glaringly ambiguous. The operative language, "for the term of this agreement," leaves open the question as to which contract term it is referring. The reader does not know whether it is the term during which the dispute arises, the term during which a grievance is filed, or the term during which the arbitrator renders his decision. It is, of course, entirely possible for each to occur during a different term.

Any suggestion that §9.2 (4th) has the restrictive effect argued by the union is negated by Arbitrator Seidenberg's award. In it, he adopted the earlier interpretation of Arbitrator Howard in a decision issued during a previous term of the contract. In following the Howard award, which undoubtedly was one of those to which he referred in his opinion (PA. 68), Arbitrator Seidenberg obviously did not consider the cited contractual provision to have voided that award or its construction of the contract.

Significantly, notwithstanding §9.2(4th), General Counsel obviously felt bound here by an arbitral award rendered under a prior term of the labor agreement. He stipulated that the work stoppage, which was a sympathy strike, was unlawful under the contract. Since there is no express provision in the agreement barring sympathy strikes, General Counsel must have been relying on the 1972 decision of Arbitrator S. Stanley Alderfer which construed the general no-strike clause to ban them. (JA 11-12, 13).

D. *The Arbitral Awards Here Clearly and Unmistakably Imposed Special Duties on Union Officials.*

The issue is reduced, then, to whether the arbitration awards furnish a sufficiently explicit statement imposing on union officials additional responsibility in the event of an illegal strike.[20] Even under a "clear and unmistakable language" test, they unquestionably do. Arbitrator Howard said:

> The three grievants [the local union president, vice-president and a steward] stood in a position different from the other employees. . .. It is well-established that Union officials have an *affirmative duty* to protect the authority of the Union leadership from illegitimate action on the part of employees, and to uphold the sanctity of the Agreement and its established grievance procedures. Failure to exercise this responsibility subjects them to more serious penalties.

(PA. 60). He then defined the scope of the union officials' obligations by describing how the grievants failed to carry out that duty. Their primary failure was in not demonstrating to the company that they were exerting every effort to halt the stoppage at the outset. Instead, they attempted to bargain concessions from the company. Arbitrator Howard observed that the union officials' "mere *participation*" in the illegal work stoppage was sufficient to justify a differential penalty. (*Id.*) (emphasis original).

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20. To the extent the issue may be viewed in terms of a waiver of a statutory right (i.e. to be free of discrimination under Section 8(a)(3)), it involves an indirect waiver through the imposition of additional responsibilities on union officials. Breaching these duties makes an official guilty of a more serious offense than other participants in an unlawful strike and, hence, subject to more severe discipline. *See* discussion at 20-21, *supra*.

Arbitrator Seidenberg described the responsibility of a union official in the following passage:

> There is substantial competent evidence to support the Company's charge that [the senior shop steward] was derelict in fulfilling his obligations as a responsible union officer, to ensure that the employees were told, with dispatch and firmness, that the Union would not countenance their improper and unauthorized conduct in withholding their services, in a concerted manner, from the Company because of a fancied wrong.

(PA. 70). Arbitrator Seidenberg concluded as to the senior steward that he "exercised no firm leadership role," that he "did not, of his own initiative, direct the men collectively to go into the plant to carry out their job duties" and that his conduct "was passive and ineffective." (PA. 70,71).

The statements of Arbitrators Howard and Seidenberg unequivocally delineate what is expected of a union official in the event of an illegal strike under Metropolitan Edison's contract. They manifestly satisfy a "clear and unmistakable" standard, should that be applicable. Just as clearly, Lang and Light fell far short of satisfying what was required of them.

That an arbitration award which the parties do not modify can serve as a waiver was recognized here by General Counsel who stipulated that the strike was unlawful. Although the Board has established a firm rule that a general no-strike pledge alone is insufficient to qualify as the requisite clear and unmistakable waiver of the right to engage in sympathy actions, *Gary-Hobart Water Corp.*, 210 N.L.R.B. 742, 744 (1974), *enf'd*, 511 F.2d 824 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975); *see Operating Engineers, Local 18 [Davis-McKee, Inc.]*, 238 N.L.R.B. 652 (1978), General Counsel obviously felt that the Alderfer award, which had not been altered by the parties in subsequent negotiations, satisfied the

waiver requirement. It is, therefore, flagrantly inconsistent for the Board and court of appeals to refuse to give similar deference and effect to the consistent contractual construction of Arbitrators Howard and Seidenberg.

III. Metropolitan Edison Was Justified in Disciplining the Union Officials More Severely Than Others for Breaching Their Special Obligation to Honor and Enforce the No-Strike Pledge.

On August 30, 1977, when they were confronted by the Operating Engineers picket line, Lang, as Chairman of the company-wide System Council and as President of Local 563, and Light, as Vice President of Local 563, were no neophytes with respect to the scope of their obligations. In 1973, both had been disciplined more severely than other employees for their participation in an unlawful strike. Very significantly, as members of Local 563's executive board, they had opted at that time to grieve on behalf of other employees but not for themselves, presumably recognizing that the law of the shop, the 1972 Howard arbitral precedent, militated against them. Moreover, in early August, 1977, they had been exposed to a similar picket line situation. Thereafter, on at least four occasions during that month they were explicitly reminded (in accordance with Arbitrator Alderfer's 1972 decision prohibiting sympathy strikes) that if another picket line appeared, they had a duty as union officials to inform the other employees of their obligation to report for work and, further, to set an example by reporting themselves (as recognized by Arbitrators Howard and Seidenberg).

As noted, the failure of the employees to cross the picket line and work on August 30, 1977 was unlawful. Hence there was no claim of violation in disciplining first-time offenders for five days or second-time offend-

ers, including Lang and Light, for ten days. Only the additional fifteen-day penalty to the union officers was challenged in this case.

Both Lang and Light admitted that on August 30 they did not attempt, through persuasion or otherwise, to have the company's employees report for work. (JA. 88-89, 103-04). Nor did either of them make any effort to report. (JA. 88-89, 103-04, 110-11). Quite to the contrary, throughout the morning, even in front of groups of bargaining unit members, they insisted defiantly to company officials that neither they nor the employees would work until the Operating Engineers' picket line was removed from the North Gate. (JA. 55-56). At one point, Lang arrogantly countermanded a supervisor's instruction to an employee to report, by directing him, as prearranged, to go to the union hall. (JA. 73, 76-77, 78, 88). At another stage, Light contemptuously ignored a company manager's urgent request to go to work by getting into his truck and driving toward the union hall. (JA. 56-57). In a boldly revealing comment, Lang told a company manager that the IBEW members were refusing to cross the Operating Engineers' picket line so that they could count on the latter's cooperation the following year in the event the IBEW struck Metropolitan Edison. (JA. 53-54).

Throughout, Lang and Light demonstrated no interest in honoring the commitments to which they alone, on behalf of Local 563, had affixed their signatures as local union officers. (RX No. 1 at 48). Instead of working to see that their no-strike pledge was fulfilled by the employees and respecting it themselves, they confined their efforts to determining what the pickets wanted in return for leaving the North Gate and persuading (through their refusal to work) Metropolitan Edison to satisfy those demands. (JA. 56-57, 65, 69, 70, 89, 96-98, 102-04). Lang and Light sought only to remove the conditions under which they had determined to breach their no-strike pledge. In effect, they anointed

themselves mediators. But it was not for them to assume that role in the conflict between the Operating Engineers and Metropolitan Edison or any other employer. Theirs was the unambiguous duty to enforce and honor their contract, which meant directing rank-and-file employees to cross the picket line and doing so themselves.

Quoting the administrative law judge, the Third Circuit described the mediating efforts of Lang and Light in heroic terms. The court expressed concern that they would be placed in an untenable position if they could be disciplined for failing to meet their responsibility as union officials, if doing so would cause them to lose control over, or authority with, employees who might defy them. (PA. 9). This political dilemma, real or imagined, provides no excuse or justification for their failing to do what the contract and arbitral awards committed them to do, namely, honor their no-strike pledge. As Board Member Penello said in dissent:

> [T]heir efforts to remove the picket line were inconsistent with their refusal to abide by the contract themselves and cross the picket line to go to work. Thus, their actions clearly suggested to the employees that as long as the pickets remained, employees had the right to refuse to cross the picket line, especially since they made no attempt to remind employees that the strike violated the contract or to urge other employees to cross the picket line and return to work. I would find that, in light of this inconsistency, their actions effectively demonstrated tacit approval of the employee's refusal to cross the picket line and undermined the Union's contractual no-strike commitment.

(PA. 26).

Thus, taking into consideration the unchallenged discipline imposed on Lang and Light in 1973 for similar misconduct and all of the events of August, 1977, culminating in the illegal work stoppage on August 30, the ad-

ditional penalty imposed on them was clearly warranted and appropriate. This is especially true when it is borne in mind that we are not here dealing with the breach of a no-strike pledge at an ordinary manufacturing plant or at a retail store. This was a nuclear power station where, as Metropolitan Edison too well knows, work stations must be faithfully manned and constant vigilance maintained lest the safety of the employees at the plant and that of the general public in the vicinity be compromised.

The Third Circuit committed a fundamental error in viewing the discipline of Lang and Light to be unlawfully discriminatory, despite the fact that they participated in an activity which was stipulated to be unlawful and for which the penalty imposed was sanctioned by at least two previous arbitral decisions interpreting Metropolitan Edison's contract. The court of appeals decision should, therefore, be reversed.

IV. Apart From Contractually Imposed Obligations, Union Officials May Be Selectively Disciplined for Striking Illegally Because of Their Inherently Higher Responsibility.

A. *Pre*-Precision Castings *Board Law and Arbitral Authority Sanction Selective Discipline of Union Officials in the Instant Circumstances.*

The Board's Precision Castings decision represented a dramatic departure from its prior cases. But the significance of *Precision Castings* goes well beyond the voiding of many years of Board law. It contradicts consistent arbitral authority of even longer duration and virtually universal acceptance. The rule in arbitration is that inherent in union officials' positions is a responsibility beyond that of rank-and-file employees to adhere religiously to the terms of their labor agreements and to instruct their constituents to do likewise. The corollary, also well-accepted in the American common law of labor

relations, is that for breach of that higher duty union officials may be punished more severely than ordinary employees in the same circumstances.

The classic statement of these rules was authored by Arbitrator Eric Schmertz in *United Parcel Service, Inc.*, 47 LA 1100 (1966). He wrote:

> If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all of the provisions of the Collective Bargaining Agreement and to actively instruct each employee to do so as well. While it is improper for an ordinary employee to deliberately breach the Agreement, a similar act by a shop steward is untenable and grounds for his discharge. It is the obligation of the steward to set an example for all Union members within his jurisdiction by demonstrating his loyalty to the terms and conditions of the contract negotiated by his Union with the Employer. . . . [A] shop steward's duty in the face of an unauthorized work stoppage is well settled. Not only should he make a determined effort to prevent the stoppage before it begins, but upon its development [he] must actively and unequivocally attempt to bring an end of the stoppage at the earliest possible moment.

Id. at 1100-01. *See Gould*, 237 N.L.R.B. at 885 n.15 (dissenting opinion of Member Penello).

Similar references appeared in the earlier Board cases. *Riviera Manufacturing Co.*, 167 N.L.R.B. 772, 775 (1967); *University Overland Express, Inc.*, 129 N.L.R.B. 82, 92 (1960); *Stockham Pipefittings Co.*, 84 N.L.R.B. 629 (1949). *See also Russell Packing Co.*, 133 N.L.R.B. 194, 197 (1961).

In his sharp dissent in *Gould*, and in his concurring opinion in *Midwest Precision Castings Co.*, 244 N.L.R.B. 597, 600-01 (1979), Board Member Penello ex-

plained the theories which underlay the view that the greater obligation of union officials is inherent in their positions as a matter of law. These may be broadly categorized as the "benefits/burdens" analysis and the "natural leader" theory.

The "benefits/burdens" view is premised on the well-recognized precept that union officials are a class separate from other employees and have received more favorable treatment because of their responsibilities for administering labor agreements and their roles in the collective bargaining process. These privileges include the latitude to engage in activities or behavior while performing their duties for which rank-and-file employees could be punished, even discharged.[21] *See Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227, 231 n.10 (7th Cir. 1979). According to Penello, the tradeoff, recognized before *Precision Castings*, is that union officials have certain duties and responsibilities *inherent* in their positions, the foremost of which is the enforcement of a no-strike clause. *Midwest Precision Castings*, 244 N.L.R.B. at 600 (concurring opinion of Member Penello).

The "natural leader" theory derives from the realities of everyday experience in an organized shop. Member Penello has written: "By the very nature of his position with the union a steward occupies a position of some authority vis-a-vis his fellow employees, and those employees will of necessity look towards the steward for guidance and leadership on any issue which arises on a daily basis in the plant." *Id.* at 601 (concurring opinion of Member Penello). This is even more true where, as here, Lang and Light occupied the two highest ranking

21. Examples of the privileges extended to union officials under Metropolitan Edison's labor agreement are mandatory leave without loss of seniority to serve in a union position (Article VIII, §8.3) (RX No. 1 at 43), and the right to process grievances without loss of pay and to attend arbitration hearings (Article IX, §9.4) (*id.* at 45-46).

elective positions in the local union and Lang occupied the highest position in the entire company-wide bargaining unit, Chairman of the System Council. Their acting in concert with the strikers was inevitably viewed by the wrongdoers as approval for their action.

The members of the Board's *Precision Castings* panel have themselves recognized that union representatives are indeed distinguishable from other employees and that their wrongdoing is more serious and, therefore, subject to greater discipline. See *Midwest Precision Castings* where the Board approved the selective discipline of a union steward who, with others, had attempted to foment a slowdown, because the steward's efforts necessarily carried more weight solely as a result of her status. 244 N.L.R.B. at 599. One of the majority panelists in the instant case, then-Chairman Fanning, observed in a concurring opinion in that case: "An employee who is told she 'better slow down' may well view it as a threat coming from a steward, while dismissing as banter the same comment from an employee." *Id.* (concurring opinion of Chairman Fanning). *See Chrysler Corp., Dodge Truck Plant*, 232 N.L.R.B. 466, 474-75 (1977); *Super Value Xenia*, 228 N.L.R.B. 1254, 1259 (1977). *See also NLRB v. Armour-Dial, Inc.*, 638 F.2d 51 (8th Cir. 1981).

Member Penello makes several points worth noting in support of either the "benefits/burdens" or "natural leader" theory. Referring to the widespread and deep-rooted arbitral view described above, he opined that even though the Board is not bound by such authority, for the Board to disregard this "common law of the shop" — that (even without specific contract language) union officials have affirmative duties under collective bargaining agreements — is for it to ignore the lessons of the *Steelworkers Trilogy*. *Gould*, 237 N.L.R.B. at 886 (dissenting opinion of Member Penello).

Moreover, the essence of the discrimination required under Section 8(a)(3) is the disparate treatment

of *similarly situated persons* on the basis of their union activity. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32 (1967); *Radio Officers v. NLRB*, 347 U.S. 17, 42-43 (1954); *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 747 (5th Cir. 1979); *Mueller Brass Co. v. NLRB*, 544 F.2d 815, 819 (5th Cir. 1977) ("The essence of discrimination in violation of Section 8(a)(3) of the Act is in treating like cases differently."). The Board has blatantly erred in declaring by fiat that the additional responsibilities inherent in the positions of union officials, which both it and arbitrators had recognized for years, are inconsequential in determining relative degrees of culpability among unlawful strikers.[22] In so doing, the Board artificially and arbitrarily attempted to paint union officials and rank-and-file employees with a single stroke as similarly situated, when common experience tells us they are not. Because their positions are not the same by reason of their different levels of responsibility, it cannot be unlawfully discriminatory to treat them disparately on that basis.

B. *A No-Strike Pledge Is Seriously Undermined If Union Officials May Not Be Selectively Disciplined For Its Breach.*

The importance of union officials being accountable as a matter of law for affirmatively upholding a no-strike pledge is readily apparent from its function as the quid pro quo for the employer's agreement to the arbitration of grievances — the foundation of peaceful labor-management relations. *Lincoln Mills*, 353 U.S. at 455. If employers cannot effectively enforce a no-strike clause and get the benefit of their bargain, they are unlikely to be

22. *Compare J. P. Wetherby Construction Co.*, 182 N.L.R.B. 690 (1970), where the Board permitted a union official to be more harshly disciplined than other illegal strikers because he was more culpable, having instigated the work stoppage. In the instant case the union officials were likewise disciplined selectively because of their greater culpability in failing to meet their special responsibilities.

willing to agree to arbitration, thereby setting the stage for industrial strife. At present, employers have precious few means of compelling compliance with such a commitment. First, except in a *Boys Market* situation, the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §101 (1976), precludes injunctive enforcement. Second, if the strike is not instigated or authorized by the union and it cannot otherwise be held accountable under common law rules of agency, there is no remedy in damages against it. *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 216-18 (1979). Third, there is no remedy in damages against individual employees. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981).

The employer is thus left with but one potentially effective remedy — discipline of the participants. *Sinclair Oil Corp. v. OCAW*, 452 F.2d 49, 54 (7th Cir. 1971). That remedy, however, is likely to be illusory where the number of employees involved makes it impossible, as a practical matter, for the employer to impose penalties that will have a real impact without impairing its own ability to operate. *See* ELKOURI, *supra* at 645-46. As a result, it is critical in those circumstances that the employer be able to expect the union leaders among its employees to stand up for the contract by taking affirmative steps to induce the employees to return to work and by not participating even passively in the illegal stoppage. The only way an employer can hope to receive that cooperation is if it has the power to single out the union leaders for discipline.

The question then becomes: what is it by law that union officials must do to satisfy this higher obligation? In his opinion herein Member Penello has spoken in terms of an "affirmative duty" to take steps to end an illegal strike, and a "negative duty" to refrain from participating in it. (PA. 26-27). Logically, it would seem incumbent on a union official to attempt to fulfill his affirmative duty first. But, if unsuccessful, the official's ultimate duty is to adhere to the contract himself and not to become a participant in the unlawful action.

It begs the question to frame the issue, as the Third Circuit did in this case (PA. 9) and the Seventh Circuit did in another, *C. H. Heist Corp. v. NLRB*, 657 F.2d 178, 183 (7th Cir. 1981), in terms of whether a union leader finds it politically difficult to fulfill his no-strike pledge and to excuse him if it is. The only question is whether the freely-made contractual commitment requires the crossing of a picket line. To consider internal union politics to be more important would be tantamount to permitting union leaders, such as Lang and Light, to sign, as they did, a blanket promise not to strike while adding: "unless we find it more expedient to do otherwise." The entirety of the labor agreement is thereby undermined and the collective bargaining process inevitably loses credibility in the eyes of both management and the employees. Unless the union officials are told clearly and unequivocally that, as the natural leaders of their constituents, they must themselves comply with the terms of the contract or suffer the consequences, rank-and-file employees cannot be expected to abide by it. Unless union officials are so informed, employers will be doomed to frustration in their efforts to achieve, in fact, the protection they thought they had gained in agreeing to arbitration in exchange for a no-strike clause.

In the case at bar, neither Lang nor Light satisfied their responsibilities as leaders. Although they made efforts to have the stranger picket line removed, they did not disavow the refusal of Metropolitan Edison's employees to report for work or instruct the employees that they were violating the contract. To repeat the thrust of Member Penello's position, their mediating efforts were also inconsistent with their own duty to abide by the agreement and its requirement that they cross the picket line and report for work. Instead, their actions clearly suggested to the employees that as long as the pickets remained they had the right to remain out of work. By their conduct and their mere presence, Lang and Light "effectively demonstrated tacit approval of the employees' refusal to cross the picket line and undermined the Union's contractual no-strike commitment." (PA. 26).

CONCLUSION

Petitioner submits that inherent in a union official's position is an added responsibility to honor and secure employee compliance with the collective bargaining agreement, for breach of which duty he may receive added discipline. In this case the union officers violated their special duty by participating in an illegal work stoppage and by failing to use every effort to end it. Therefore, the discipline imposed on them was justifiable and lawful.

Even if there must be a contractual basis for holding union officials to that higher obligation, federal labor policy clearly requires that the NLRB and courts recognize arbitral decisions under collective bargaining agreements as capable of furnishing that foundation and that they then give effect to them. The contrary judgment of the Third Circuit which is before the Court for review is inconsistent with that policy.

Metropolitan Edison Company, therefore, respectfully requests this Court to reverse the judgment of the court of appeals and to direct that the court of appeals remand the case to the National Labor Relations Board with instructions to dismiss with prejudice the Complaint against Metropolitan Edison.

Respectfully submitted,

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Respondent's Brief

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In the Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether an employer violates Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158 (a)(3) and (1), by disciplining employees holding union office more severely than it does other employees for identical conduct that violates a general no-strike clause, where the collective bargaining agreement contains no express provision requiring union officers to take affirmative steps to prevent or curtail contractually prohibited work stoppages.

2. Whether the Board reasonably declined to defer to the decisions of arbitrators construing the general no-strike clause of prior collective bargaining agreements as imposing such an affirmative obligation on employees holding union office and permitting them to be punished more severely than other employees for the same acts of participation in a contractually prohibited work stoppage.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-21) is reported at 663 F.2d 478. The decision and order of the National Labor Relations Board (Pet. App. A-22 to A-29), and the underlying decision of the administrative law judge (Pet. App. A-30 to A-49), are reported at 252 N.L.R.B. 1030.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-50) was entered on December 9, 1981. A petition for rehearing was denied on January 5, 1982 (Pet. App. A-51). The petition for a writ of certiorari was filed on March 4, 1982, and granted on June 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act ("the Act"), 29 U.S.C. (& Supp. IV) 151 *et seq.*, are set forth at Pet. Br. 2.

STATEMENT

A. The Record before the Board

1. Petitioner Metropolitan Edison Company ("the Company") produces and sells electrical power in Southeastern Pennsylvania (Pet. App. A-3; J.A. 25).[1] About half of the Company's employees in its various operating divisions are represented by five local affiliates of the International Brotherhood of Electrical Workers ("the International Union"), including the charging party in this case (Local 563 or "the Union"). Those five locals negotiate together for a single collective bargaining agreement (Pet. App. A-31; J.A. 26).

The agreement in effect at the time of the events at issue, as well as predecessor agreements, contained the following no-strike clause (Pet. App. A-32; R. Exh. 1, Art. XI):

> No Strikes—No Lockouts
>
> 11.1 The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public.

The agreement also contained a grievance and arbitration procedure for employee grievances (R. Exh. 1, Art. IX), and provided that any decision by an arbitrator would be binding "for the term of this agreement" (*id.* at Art. IX, Section 9.2, 4th para.).

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[1] "Pet. App." refers to the appendix to the petition for certiorari, "J.A." to the joint appendix filed in this Court, "G.C. Exh." and "R. Exh." to exhibits introduced by the General Counsel and the Respondent (petitioner here), respectively, in the Board proceedings.

2. Work stoppages by members belonging to a local other than Local 563 occurred on three occasions, in 1970, 1972, and 1974. Following each incident the Company disciplined all involved through warnings or suspensions; the punishments for certain union officials involved (including a shop steward) were more severe than those imposed on other employees. The local involved took to arbitration the question whether the disparate punishment in connection with the 1972 and 1974 work stoppages was justified, and the arbitrators upheld the Company's discipline (Pet. App. A-36 to A-37; J.A. 29-32, 25-26; Pet. App. A-52 to A-61 (Arb. Howard), A-62 to A-72 (Arb. Seidenberg)).

Members of Local 563 engaged in a refusal to report for work in 1973 and on two occasions in 1977. In 1973 and on the second occasion in 1977, the Company imposed more severe discipline (longer suspensions) on union officers than on other employees (Pet. App. A-36 to A-37; J.A. 14-15, 32, 36, 38-39, 41). These work stoppages occurred at the Company's Three Mile Island nuclear generating station, a two-unit plant located on an island in the Susquehanna River (Pet. App. A-3, A-32, A-36 to A-37; J.A. 32, 36, 39-41).[2]

3. The first 1977 incident occurred on August 4, when employees in Local 563 refused to cross a picket line established at one of two bridges to the island by members of the Pipefitters' union, who were picketing a construction subcontractor on the island (Pet. App. A-37; J.A. 38, 82-83). A Company representative told David Lang, the president of Local 563, that he and the other officials were "in trouble" if they did not cross the picket line and get the other Union members to work (Pet. App. A-37; J.A. 83). Lang then talked to the Pipefitters' business agent and got him to agree to "take the line down" (J.A.

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[2] Construction commenced on the plant in 1968. The first unit went into commercial operation in 1974, and the second unit was still under construction at the time of the hearing (Pet. App. A-3; J.A. 37).

83-84).[3] By 9:00 a.m., most of the Company employees were back at work (J.A. 84). Approximately 35 to 40 employees did not report, however, until later in the day, and 45 to 50 employees failed to report at any time that day (G.C. Exh. 6).

4. Following the August 4 incident, there were several meetings between the Executive Board of Local 563 and the Company. The Company asserted that Union officials Lang and Light had an "absolute obligation to have their employees report to work" and should themselves cross any picket line immediately so that others, following their example, would also return to work (J.A. 40, 109). However, like the other employees who had reported to work at 9 a.m. on August 4, after the picket line was down, Lang and Light were not disciplined for refusing to cross the picket line at the time of their scheduled shifts (J.A. 39, 45).

After work on August 4, Local 563 held a meeting (Pet. App. A-37; J.A. 85). President Lang and other Union officials had decided to hold the meeting "to get things straight because half the people did not show up and half the people were mad[] at us for going in" (J.A. 85). At the meeting, Lang explained that he had telephoned the International Union and had been told that the employees "should have crossed the picket line and gone to work" (J.A. 85-86). The employees "vociferously" disagreed and the meeting "got out of hand" (Pet. App. A-37 to A-38; J.A. 86). One employee stated that anyone who crossed the picket line was a "scab," particularly if he was on the Union Executive Board (J.A. 94).

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[3] Lang testified that, in 1976, the Operating Engineers' union, protesting a subcontractor's hiring practices, had picketed the Three Mile Island plant and that Company Superintendent Jack Herbine had contacted him by telephone to advise him that it was his "duty" as the Local 563 president to "see that all of the [Local's] members * * * go to * * * work" and that it was his "responsibility to move pickets" (J.A. 81). Herbine told Lang to "find out why the pickets are there and get them out of there" (*ibid.*). Lang's efforts resulted in the removal of the picket line (*ibid.*).

Then he offered a motion that "the next time there is a picket line * * * no one should cross" (J.A. 86). Lang refused to accept this motion, stating that it was "out of order," but the clamor continued. Before the meeting ended, Lang again advised the employees that they were not right in thinking that it was permissible to refuse to cross a picket line, but that if they nevertheless refused they should at least go to the union hall rather than "hang[] out in bars" (J.A. 86, 96).[4]

5. On August 30, 1977, at about 6 a.m., members of the Operating Engineers' union began picketing at the north gate of the Company plant, the main island entrance normally used by Company employees; they were protesting a maintenance subcontractor's refusal to hire members of their union (Pet. App. A-3, A-33; J.A. 38, 62-63, 87).

Several Company representatives were informed of this at home and one of them, Personnel Administrator Gary Hahn, telephoned Union President Lang at his home, advising him that Company employees represented by the Union were refusing to cross the Operating Engineers' picket line and that Lang "ought to come in and see what could be done" and "try to straighten it out" (J.A. 78, 87). It is stipulated that the employees' refusal to cross the picket line was a violation of the no-strike clause (Pet. App. A-33; J.A. 21).

Lang, Hahn, and Company Coordinator Walter Poyck went to the north gate of the plant. There Lang talked to the leader of the picket line, who said he would not remove the line until ordered to do so by his union's business agent. Lang decided to talk to the business agent directly and got his telephone number from the picket

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[4] At a subsequent Union meeting, Lang reiterated his position on members' responsibilities in such situations. A rank-and-file member stated that the Union should adhere to the sentiment of the August 4 meeting—that they would not cross a picket line. And, as Lang testified, "[t]hat is how the meeting ended. We could not get the people to change their mind" (J.A. 91).

leader. He then spoke with Administrator Hahn, who told Lang that his "obligation [was] to go in and work." While Hahn and Lang were talking, an employee arrived in his car, asked Lang what he should do, and then went to the Union hall, which was in the town of Middletown, about three miles from the plant (Pet. App. A-34, A-41; J.A. 87-88, 52, 54).[5]

At about 7:05 a.m., Union Vice President Gene Light, while driving to the plant, saw other employees heading toward the Union hall. They signalled him to follow. Since Light's work shift was not scheduled to begin until 7:30, he believed he had enough time to go to the Union hall before work (J.A. 102).

At about 7:15, Lang arrived at the Union hall, where a number of employees had gathered. He was unable to reach the Operating Engineers' business agent to urge removal of the picket line, so he told Vice President Light and two other employees to go to the picket line and try to negotiate with the picketers to "get them off the bridge so the people can go to work" (Pet. App. A-35; J.A. 88). Soon after Light left, Company Personnel Director Thomas Hombach arrived and told Lang that he "should be trying to report to work and ask the members to follow him." Lang said that "it was the consensus of opinion" that the Union employees would not cross the picket line and that they would not report to work "until the line was completely down" (Pet. App. A-35; J.A. 88).

Meanwhile, Light arrived at the picket line and spoke with the picket leader about the reason for the picketing. He then talked to Company representatives Poyck and Hahn, explaining that, even if he were to cross the picket line, the other employees would probably not follow. He

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[5] According to Lang, he responded to the employee's query by saying, "you know what you are supposed to do" (J.A. 88). According to Hahn, Lang answered, "go to the union hall" (J.A. 73). The administrative law judge found it unnecessary to resolve this difference in testimony (Pet. App. A-43 n.8).

said that he was "trying to get the picketers removed" and asked if the Company was doing anything "to get this thing squared away." Poyck said the Company was "doing something internally at the Island to try to handle the situation" and that Lang and Light were in "big trouble" if they did not cross the picket line (Pet. App. A-35; J.A. 102-103).

When Light returned to the Union hall, he explained to Lang and the other employees why the picketers were there and what the picket leader had said. After a few minutes, Lang told Light and another employee to go back to the picket line, talk to the picket leader to try to "get him to change his attitude or anything like that," and to "make any kind of deal" he could to remove the picket line and allow the Union employees to go to work (J.A. 103).

Light and the other employee returned to the line and talked to the picket leader, asking if there was "any way" the pickets could be removed. Light was given the telephone number of the Operating Engineers' union hall, and he told the picket leader he would talk to his business agent. Then, Personnel Director Hombach approached and told Light that he and Lang were in "big trouble" because they were union officials. Light replied that the Union wanted "to get this thing resolved once and for all so it doesn't happen again" (Pet. App. A-35; J.A. 103-104).

Meanwhile, at the Union hall, Company representative Poyck told Lang he should go to work and lead the other employees in. Lang answered that the employees had already decided not to go in and that he felt it would be better for all concerned if he stayed out with the others; this, he reasoned, would at least enable him to negotiate with the picketers (Pet. App. A-35; J.A. 89).

Shortly before 11:00 a.m., Lang again went to the picket line and urged the picketers to leave the north gate. He asked the picket line leader, "[w]hat do [we] have to do to get you guys off the bridge?" The picket leader responded, "[w]hat we need is no more contractors crossing the north bridge" (Pet. App. A-35; J.A. 89-90). Lang

then told Poyck what the picket leader had said. Soon thereafter, at about 11:00 a.m., the Company established a "reserved gate" for the maintenance subcontractor's employees at the island's south entrance. As a result, the north gate picketing stopped (Pet. App. A-35; J.A. 66-67, 90).

Meanwhile, Supervisor Hombach had gone to the Union hall. Shortly after he arrived, he received a telephone call from a Company superintendent, who dictated a letter to Hombach, directing Lang, as president of the Union, to "forceably and emphatically tell" the employees that, by not reporting to work, they were in violation of the contract and were therefore subject to "severe disciplinary action including termination of employment" (J.A. 90; R. Exh. 7). As Lang was assembling the employees, he received a telephone report that the picket line had left the north gate. Lang announced that the picket line was down and that everyone could go to work. He also read the Company superintendent's letter aloud. Immediately thereafter, the employees went to work (J.A. 90-91).

6. The Company thereafter disciplined employees participating in the August 30 incident by suspending 121 for five days and another 14 for ten days. Lang and Light, however, were suspended for 25 days (Pet. App. A-33; J.A. 16-17, 36). At a meeting called to discuss the discipline, a Company vice-president explained to Lang and Light that, as union officials, they had had a duty to cross the picket line (J.A. 46, 92). On its "Record of Disciplinary Action" forms compiled for all 137 disciplined employees, the Company stated that discipline was being administered for "failure to report to work" and for "participation in an unlawful work stoppage" (Pet. App. A-33; J.A. 16-17; G.C. Exhs. 4 & 5). The forms completed for Union officials Lang and Light also stated (Pet. App. A-33 to A-34; J.A. 16-17):

> In addition, you are being disciplined for your failure as an elected official of Local Union 563 IBEW to demonstrate to the Company, in an objective manner, your affirmative duty as an elected officer to:

(a) Make every effort to uphold the sanctity of the Agreement and its established grievance procedures.

(b) Make every bona fide effort to prevent the unlawful work stoppage.

(c) Make every effort, including returning to work yourself, to end the unlawful work stoppage.

The forms further warned Lang and Light that their participation in "any unlawful work stoppage in the future" would result in their "immediate discharge" (*ibid.*). Shortly thereafter, concerned over the discharge threat, Lang resigned his job with the Company (J.A. 80).

B. The Board's Decision and Order

The issue before the Board was the legality under the Act of the additional discipline imposed on Lang and Light for the August 30 incident. The Board noted that it was not questioning the Company's right to discipline employees, including union officials, for refusing, in violation of a no-strike clause, to cross a picket line (Pet. App. A-39 n. 4). In addition, the Board rejected the Company's contentions that Lang and Light were active leaders of the Operating Engineers' strike and that they fomented the work stoppage (*id.* at A-43). It found that the union officers had simply failed to take the affirmative steps deemed appropriate by the Company to stop the workers' refusal to cross the picket line (*id.* at A-40 to A-41, A-43). Thus, the Board reasoned, they were singled out for extra discipline solely because of their status as union officers—an action that violates Section 8(a)(3) and (1) of the Act because it discourages employees from becoming active as officials in their unions (Pet. App. A-22 n. 1, A-43 to A-44). Board Member Penello dissented, stating that the Company could lawfully discipline Lang and Light more severely because

they had "failed to comply with their responsibility as union officers to enforce the contract" (*id.* at A-24 to A-27).

The Board's order requires, *inter alia*, that the Company revoke the suspensions of Lang and Light to the extent that they exceeded discipline meted out to other employees and compensate Lang and Light for the loss of earnings attributable to the discrimination (Pet. App. A-45 to A-47, A-22 to A-23 & n. 2).

C. The Decision of the Court of Appeals

The court of appeals, with one dissent, enforced the Board's order (Pet. App. A-1 to A-12). Relying on prior Third Circuit precedent, it accepted the proposition that "[a]n employer may impose greater discipline on union officials if the collective bargaining agreement enumerates specific affirmative steps a union official is to take in the event of an illegal work stoppage and the official has failed to perform those actions" (Pet. App. A-5 to A-6). Because the holding of union office is a protected activity, however, the court held that, absent clear contractual language showing that a union has consented to placing additional duties on union officials, an employer violates Section 8(a)(3) and (1) of the Act by disciplining union officers more severely than other employees for engaging in a strike in violation of contract or failing to take affirmative steps to end it (Pet. App. A-8 to A-10).

The court concluded that such clear contractual consent was not present here. The bargaining agreement contained no language placing additional duties on union officials in connection with work stoppages, and the court rejected the Company's contention that the Board was required to find a clear union consent to the imposition of such duties by virtue of two arbitral decisions under predecessor agreements with identical no-strike clauses (Pet. App. A-10 to A-12; see pages 2-3, *supra*).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), expressly prohibits employers from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In this case and in the line of authority on which this case relies, the Board has concluded that an employer unlawfully discriminates on the basis of union considerations when it disciplines one employee more harshly for participation in a contractually-prohibited work stoppage than it does another, merely because the former employee is a union officer. It follows *a fortiori* that the Board also finds a violation when the employer punishes the employee holding union office for failing to take what the employer deems adequate steps to prevent or curtail such a work stoppage, while imposing no such obligation or penalty on rank-and-file employees. In both instances, in the Board's analysis, the employee is receiving augmented discipline based not on his participation in unprotected activity—a work stoppage in violation of contract—but on his status as a union officeholder.

Several courts of appeals have upheld Board findings that employers violated Section 8(a)(3) of the Act by imposing such disparate discipline. These courts have concluded also that a union may contractually consent to an attenuation of the right to hold union office by agreeing in clear and unmistakable language to the imposition on union officers of affirmative obligations to prevent or curtail contractually prohibited work stoppages. Thus, in cases where there has been an unambiguous waiver of the right of union officers to be free of augmented discipline, the courts have concluded that an employer does not violate the Act by imposing more severe discipline on union officers in accordance with the clear contract provisions.

The Board has not resolved the question whether a union may thus waive rights of employees under the Act, and

it is not necessary to resolve that question in the present case. As explained below, neither the general no-strike clause of the collective bargaining agreement nor the arbitral awards on which the Company relies constitute a clear and unmistakable waiver of employees' statutory rights.

I.

The disciplinary notices that the Company issued to its employees who declined to cross the Operating Engineers' picket line on August 30, 1977, made it clear that Lang and Light had received the longest suspensions solely because they were Union officers. The notices also made it clear that Lang and Light would be subject to discharge if they participated in another such work stoppage.

Such a disciplinary standard constitutes disparate treatment that foreseeably discourages employees from engaging in the protected activity of serving in union office, and it is inherently destructive of the right to engage in such activity. For that reason it violates Section 8(a)(3) of the Act. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 227-228 (1963); *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). This is not to say that union officers enjoy any right to engage in activity that violates no-strike clauses, free from the threat of discipline. Under the Board's analysis, an employer may discipline employees holding union office as severely as it does other rank-and-file employees for such conduct, and may discipline them more severely if they instigate or lead the strike.

A major reason that the disparate treatment at issue in this case is inherently destructive of the right to hold union office is that, given the realities of industrial life, it is not a simple matter for union officers to prevent or control unauthorized ("wildcat") strikes in violation of contract. Moreover, in many cases, a union officer may reasonably believe that he can bring a wildcat strike to a more rapid end by remaining off the job with the mem-

bers rather than by going, alone, into the plant. In such circumstances, an employer policy of subjecting the officers—but not the rank-and-file employees—to especially harsh discipline for participation in the work stoppage will discourage employees from seeking union office but will do little to discourage wildcat strikes. The Board's construction of Section 8(a)(3) of the Act as permitting unlimited discipline for engaging in contractually prohibited strikes so long as that discipline is not based on the holding of union office or other protected union activities represents a reasonable accommodation of both employer and employee interests.

II.

It is generally accepted that in the case of statutory rights of employees that are waivable by a union, a waiver will be effective only when it is clear and unmistakable. That principle should apply also in the case of the right in question here, assuming that it is waivable. Unless there is clear and unmistakable evidence that a union has deliberately agreed with an employer that union officers will bear specific, well-defined responsibilities to prevent or curtail work stoppages in violation of contract, one cannot readily infer that the union has considered all of the relevant circumstances and concluded that the prospect of a double standard of discipline in the case of wildcat strikes will not unduly hamper its recruitment of union officers by discouraging employees from assuming the jobs.

The applicable standard has not been met in this case. The no-strike clause in the collective bargaining agreement contains no references whatsoever to union officers. The arbitral awards under prior agreements on which the Company relies *do* specifically state that union officers have special responsibilities with respect to contractually prohibited work stoppages and can be disciplined more

harshly than other employees for the same acts of participation; but in making these awards the arbitrators were not construing any particular language of the agreement. Thus, there was no contractual language that the Union could ask to have deleted to ensure against any future such arbitral awards. Under the Company's theory that those awards automatically became part of any new agreement unless bargained away by the Union, the Union could avoid a waiver of the employees' right to be free of discipline based on the holding of union office only by negotiating an express *disclaimer* of any such waiver. This turns upon its head the principle that waivable employee rights may be surrendered only by clear and unmistakable consent.

In deciding the statutory issue in this case, the Board was not required to defer to the arbitrators' awards under prior agreements. The arbitrators, who were free to apply any standard in deciding whether to uphold the harsher penalties for union officers, so long as that standard drew "its essence from the collective bargaining agreement" (*Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)), did not consider whether employees enjoy any rights under the National Labor Relations Act to be free of such disparate discipline and thus did not decide whether any provision in the agreement met the clear and unmistakable waiver standard. Because the arbitrators thus neither considered the statutory question at issue here nor applied the correct standard, even assuming they decided the statutory issue *sub silentio*, the Board properly declined to defer to the arbitral awards in deciding whether the Company violated Section 8(a)(3) of the Act by imposing additional days of suspension on Lang and Light solely because of their status as union officers.

ARGUMENT

I. AN EMPLOYER VIOLATES SECTION 8(a)(3) AND (1) OF THE ACT BY DISCIPLINING EMPLOYEES HOLDING UNION OFFICE MORE SEVERELY THAN IT DOES OTHER EMPLOYEES FOR IDENTICAL CONDUCT THAT VIOLATES A GENERAL NO-STRIKE CLAUSE, WHERE THE COLLECTIVE BARGAINING AGREEMENT CONTAINS NO EXPRESS PROVISION REQUIRING UNION OFFICERS TO TAKE AFFIRMATIVE STEPS TO PREVENT OR CURTAIL CONTRACTUALLY PROHIBITED WORK STOPPAGES

A. The Act Generally Prohibits Employer Actions That Directly Penalize Participation in Protected Union Activities, Because Such Penalties Are Ordinarily Inherently Destructive of the Right to Engage in Those Activities

Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[6] This includes protection against discrimination that encourages or discourages "participation in union activities" as well as that which encourages or discourages "adhesion to union membership." *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 39-40 (1954) (footnote omitted). Whether encouragement or discouragement is at issue, the central thrust of the provision is to "insulate employees' jobs from their organizational rights." *Id.* at 40 (footnote omitted). It is thus designed to ensure, among other things, that those who become union members may be as

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[6] The single exception to the Section 8(a)(3) prohibition, which concerns union security agreements meeting certain criteria, has no application to this case.

The violation of Section 8(a)(1) of the Act found by the Board is merely derivative of the Section 8(a)(3) violation.

active or inactive and as "good, bad, or indifferent" in their commitment to their union as they wish "without imperiling their livelihood." *Ibid.*

For this reason, an employer violates the Act if he discriminates on the basis of the employees' active participation in union affairs, such as holding union office or serving as the union's plant steward.[7] *General Motors Corp.*, 218 N.L.R.B. 472, 477 (1975), enforced mem., 535 F.2d 1246 (3d Cir. 1976); *Western Cartridge Co.* v. *NLRB*, 134 F.2d 240, 245 (7th Cir. 1943); *NLRB* v. *Southport Petroleum Co.*, 117 F.2d 90, 92 (5th Cir. 1941). See also *Caterpillar Tractor Co.* v. *NLRB*, 638 F.2d 140, 141 (9th Cir. 1981). As the court below observed (Pet. App. A-8, citing *General Motors Corp., supra*), "the holding of union office is the essence of protected union activities."

In most cases involving alleged violations of Section 8(a)(3), any linkage between the action taken by the employer and the union activities or sentiments of the particular employees who are benefited or penalized by that action is not apparent on the surface. Such cases call for a detailed analysis of the surrounding circumstances to determine whether the employer acted with discriminatory intent or for a legitimate business purpose. But, in some cases, the basis for the employer's action may "speak for itself—it *is* discriminatory and it *does* discourage union membership"; and it "carries with it unavoidable consequences" that the employer may be

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[7] Stewards, strictly speaking, are representatives of the employees in the collective bargaining unit that is represented by a particular union, but they are often appointed by the union and obviously have a connection to it that other unit employees do not. *General Motors Corp., supra*, 218 N.L.R.B. at 477. The two employees concerned in the present case are not stewards, but the Board's principles apply to stewards as well. For simplicity's sake we shall use the term "union officers" throughout, whether referring simply to those holding elective union office (as was the case here) or to the larger category of officeholders including plant stewards.

found as having intended. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 228-229 (1963). In *Erie Resistor*, the Court found such inherent intent in an employer's policy, during an economic strike, of granting super-seniority to all strike replacements and to those employees who abandoned the strike and returned to work. The Court noted (*id.* at 231) that "super-seniority by its very terms operate[d] to discriminate between strikers and non-strikers, both during and after the strike, and its destructive impact upon the strike and union activity [could] not be doubted." The Court concluded (*id.* at 231-232) that the Board could properly find that the employer's business purpose of keeping his plant in operation during the strike did not justify a means so damaging to the employees' right to engage in concerted activities.

In *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the Court reiterated the principle, observing that "[s]ome conduct * * * is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive" (*id.* at 33, quoting *NLRB* v. *Brown*, 380 U.S. 278, 287 (1965)). In *Great Dane*, the issue was the employer's refusal to pay accrued vacation benefits to strikers, and the Court had no difficulty in seeing this as "discrimination in its simplest form," since the denial was plainly predicated on the employees' having engaged in concerted activities. 388 U.S. at 32. The violation of Section 8(a)(3) was clear because the employer offered no evidence whatsoever of legitimate business motives (*id.* at 34); but the Court further noted that, in cases in which an "employer's discriminatory conduct was 'inherently destructive' of important employee rights," the Board might find a violation "even if the employer introduces evidence that the conduct was motivated by business considerations" (*ibid.*).

As in *Erie Resistor* and *Great Dane*, it is ordinarily reasonable to conclude that an employer's policy of directly and overtly attaching penalties to participation in

protected union activities is inherently destructive of the right to engage in those activities. *Kansas City Power & Light Co.* v. *NLRB*, 641 F.2d 553, 557-560 (8th Cir. 1981); *Kaiser Engineers* v. *NLRB*, 538 F.2d 1379, 1386 (9th Cir. 1976). See also *NLRB* v. *Haberman Construction Co.*, 641 F.2d 351, 359-360 (5th Cir. 1981) (en banc). As we show below, an employer's practice of making an employee's status as a union officer the predicate for augmenting discipline imposed on him is inherently destructive of the right to hold union office; and, at least absent a clear waiver by the union of the employees' right to be protected against such disparate treatment, such a practice constitutes discrimination in violation of Section 8(a)(3) and (1) of the Act.

B. An Employer's Augmentation of Discipline Predicated on an Employee's Status as a Union Officer is an Unlawful Discriminatory Penalty, at Least Absent an Adequate Union Waiver

It is not disputed in this case that, had Lang and Light not been officers in the Union, their failure to cross the picket line to begin their scheduled work shift on August 30, 1977, and their failure to urge fellow employees to cross it, would have resulted in less severe sanctions than the 25-day suspensions they received. The court below properly upheld the Board's finding that those suspensions constituted unlawful penalties imposed on the protected activity of holding union office insofar as they exceeded the penalties Lang and Light would have received for refusing to cross the picket line had they been rank-and-file employees. Because the penalties in question were imposed in the context of an activity that was prohibited by contract, however, it must first be made clear that this case does not involve any right to engage in work stoppages that violate a no-strike clause.

The Board accepted a stipulation that the employees' refusal to cross the picket line established by the Operating Engineers violated the no-strike clause (Pet. App. A-33; J.A. 21). Such a refusal is not protected by the Act.

Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238, 246 (1962), overruled on other grounds, *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); *NLRB* v. *Sands Manufacturing Co.*, 306 U.S. 332, 344 (1939); *Chrysler Corp., Dodge Truck Plant*, 232 N.L.R.B. 466, 474 & n.17 (1977), aff'd without opinion, 85 Lab. Cas. 11,073 (D.C. Cir. 1979). The Board thus does not question the right of an employer to discipline employees, including those who hold union office, for such activities. *Miller Brewing Co.*, 254 N.L.R.B. 266, 267 (1981), enforced *sub nom. Szewczuga* v. *NLRB*, 686 F.2d 962 (D.C. Cir. 1982), petition for cert. pending, No. 82-666. Neither does it question an employer's right to impose more severe discipline on those employees who instigate or provide leadership for unprotected strikes, whether or not such employees are union officers. See, *e.g.*, *Midwest Precision Castings Co.*, 244 N.L.R.B. 597, 598 (1979); *Chrysler Corp., Dodge Truck Plant, supra*, 232 N.L.R.B. at 474-475; *J. P. Wetherby Construction Corp.*, 182 N.L.R.B. 690, 695 (1970); *University Overland Express, Inc.*, 129 N.L.R.B. 82, 92 (1960).[8] Indeed, an employer may, without violating the Act, selectively discipline employees who strike in violation of contract, using any grounds for selection he chooses, so long as those grounds are not "union-related." *C.H. Heist Corp.*, 250 N.L.R.B. 1400, 1403 (1980), enforced, 657 F.2d 178 (7th Cir. 1981); *Precision Castings Co.*, 233 N.L.R.B. 183 (1977); *American Beef Packers, Inc.*, 196 N.L.R.B. 875 (1972).

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[8] In the present case, the Board found (Pet. App. A-43) that Lang and Light did not act as strike leaders, and the court of appeals, after reviewing the entire record, concluded that the finding was supported by substantial evidence (*id.* at A-12). Under this Court's customary practice, that finding should be permitted to stand. *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503 (1951). See also *Graver Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). In any event, the disciplinary notices issued to Lang and Light contained no suggestion that the suspensions were imposed for affirmative acts of strike leadership (Pet. App. A-33 to A-34).

When, however, an employer punishes one employee more harshly than another simply because the former holds union office and the latter does not, he has gone beyond punishing prohibited conduct and has overtly penalized a protected form of union activity.[9] A declared

[9] Starting with the proposition that, "[i]f a concerted activity is not protected, the employee [engaged in that activity] is without the protection of the Act," the Edison Electric Institute, as *amicus curiae*, contends (EEI Br. 10-13) that, because Lang and Light had engaged in an unprotected strike, they forfeited all rights to nondiscriminatory treatment by the Company with respect to that event. The argument misconstrues the Board's theory and, if it were to be accepted as the law, would lead to ludicrous results.

As explained above, the Board has never held that employees who participate in an unprotected strike are protected by the Act from being disciplined for *that* activity. Thus the Company did not violate the Act by suspending Lang and Light for declining to cross the picket line. But the degree by which their suspensions exceed those of rank-and-file employees is attributable solely to an activity that clearly is protected—the act of holding union office. The cases on which EEI relies (EEI Br. 11) merely hold either that strike activity may lose the protections of the Act when it is carried on for an unlawful purpose (*Hoover Co.* v. *NLRB*, 191 F.2d 380, 386 (6th Cir. 1951)), or that in some circumstances an otherwise protected activity may be so injurious to the employer that it loses its protected status (*NLRB* v. *Local 1229*, 346 U.S. 464 (1953)).

Under EEI's theory, employers would be free in the aftermath of a contractually prohibited strike to discharge all the union members and impose no penalties at all on nonmembers, thereby penalizing the activity of holding union membership—an action that doubtless would give pause to any remaining employees who had entertained the possibility of joining a union. Further, under EEI's theory, an employer could similarly discriminate between union members and nonunion members in disciplining employees for engaging in other types of conduct that the Board has held to be unprotected, such as protesting the appointment or discharge of a particular supervisor where the supervisor's identity and ability have no impact on the employees' working conditions. See, *e.g.*, *Puerto Rico Food Products Corp.*, 242 N.L.R.B. 899 (1979). Such a construction of the Act is plainly untenable.

The Chamber of Commerce, as *amicus curiae*, misconceives the theory of the violation in this case in a manner similar to that of EEI when it argues (Chamber Br. 14-15) that the proviso to Sec-

policy of imposing such additional discipline on union office holders foreseeably discourages employees from seeking and holding union office. *Szewczuga* v. *NLRB*, *supra*, 686 F.2d at 973; *Hammermill Paper Co.* v. *NLRB*, 658 F.2d 155, 163 (3d Cir. 1981), petition for cert. pending, No. 81-1438 (Pet. App. A-41).[10] The Board has therefore concluded that such disparate discipline—inherently destructive of employee interests—represents impermissible discrimination based on union considerations, and it has found such conduct to be a violation of Section 8(a)(3) of the Act without the need of elaborate inquires into employer motives. *E.g.*, *Consolidation Coal Co.*, 263 N.L.R.B. No. 188, 111 L.R.R.M. (BNA) 1205 (Sept. 20, 1982); *C.H. Heist Corp.*, 250 N.L.R.B. 1400, 1403 (1980), enforced, 657 F.2d 178 (7th Cir. 1981); *Indiana & Michigan Electric Co.*, 237 N.L.R.B. 226, 229 (1978), enforcement denied, 599 F.2d 227 (7th Cir. 1979); *Precision Castings Corp.*, 233 N.L.R.B. 183, 184 (1977).[11]

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tion 10(c) of the Act, 29 U.S.C. 160(c), which bars the Board from requiring the "reinstatement of any individual as an employee who has been suspended * * * or discharged for cause," precludes the Board from ordering that the suspensions of Lang and Light be reduced to the length of those that would be imposed on them if they were not union officers. The Board has directed the rescission only of that portion of the suspension that is predicated on the fact that Lang and Light held union office and not that portion for which the "cause" is their participation in the unprotected work stoppage.

[10] As we explain below (pages 25-30, *infra*), given the realities of industrial life, such an employer policy would tend to deter employees from seeking union office whether they sincerely hope that all of the union's obligations under the contract will be carried out or, instead, are heedless of those obligations.

[11] The Company and the Miller Brewing Company, filing as *amicus curiae*, contend (Pet. Br. 39-40; Miller Br. 11-17) that the Board, in *Precision Castings*, departed from a clear line of authority (beginning with *Stockham Pipe Fitting Co.*, 84 N.L.R.B. 629 (1949), and including such decisions as *University Overland Express*, *supra*), which allegedly held that union officers have a special duty of obedience to uphold the collective bargaining agreement by virtue of their union office and thus may lawfully be punished more

The Company both ignores the realities of industrial life and essentially begs the question when it contends (Pet. Br. 40-43) that harsher discipline of union officers is not *disparate* discipline because officers, unlike rank-and-file employees, are natural leaders and bear special responsibilities with respect to avoiding and halting wildcat strikes. An employer, so the Company's argument goes, simply accords varying treatment to unlike cases when it differentiates on the basis of union office in selecting the relative severity of discipline for no-strike clause violations. As we argue below (pages 25-27), in the cir-

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severely than other employees for engaging in contractually prohibited work stoppages, or for failing to take adequate steps to prevent or halt them. That line of authority is hardly as clear as the Company and the amicus suggest. See Rummage, *Union Officers and Wildcat Strikes: Freedom from Discriminatory Discipline*, 4 Indus. Rel. L. J. 258, 265 (1981)); Note, *Harsher Discipline for Union Stewards than Rank-and-File for Participation in Illegal Strike Activity*, 56 Chi.[-] Kent L. Rev. 1175 (1980). The Board made clear, as early as its decision in *Pontiac Motors Division, General Motors Corp.*, 132 N.L.R.B. 413, 414-415 (1961), more than a decade before *Precision Castings*, that, at least absent a clear contractual waiver by the union, an employer could not lawfully discipline an employee for his "failure to fulfill what the [employer] considered his obligation as a union committeeman" to persuade employees engaged in a contractually-prohibited strike to return to work.

In any event, in *Precision Castings* and its progeny, including the recent decision in *Consolidation Coal Co., supra*, the Board has explained why it has concluded that, at least in the absence of an adequate contractual waiver by the union of the pertinent employee rights, an employer violates Section 8(a)(3) of the Act by engaging in disparate discipline of the kind at issue in the present case. Even assuming that the Board in *Precision Castings* altered its reading of the statute, its present position is entitled to stand so long as it represents a "defensible construction of the statute." *NLRB* v. *Iron Workers, Local 103*, 434 U.S. 335, 350 (1978). "An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *Id.* at 351.

cumstances of an unauthorized strike, it simply cannot be assumed that employees look to union officers for guidance. Indeed, where the strike is an expression by dissident employees of dissatisfaction with both the employer and the union, the union officers may be in the worst position to quell the strike.[12]

Moreover, to contend, as the Company does (Pet. Br. 40-43), that special responsibilities to prevent or curtail contractually prohibited strikes are inherent in union office, is to beg the question in issue. Contrary to the Company's argument, it is not self-evident that Union office invests its holders with "natural leadership" or "inherent responsibilities" in all situations (see pages 25-31, *infra*). The Company's contention is essentially an argument that the responsibilities in question may reasonably be attributed to union office notwithstanding the absence of any provision so specifying contained in a union constitution, collective bargaining agreement, or statute. And that is the question in this case—whether it is proper to assume that union office necessarily carries with it the burden of preventing and curtailing contractually prohibited strikes and thereby gives rise to *additional* grounds for disciplining employees for engaging in the same conduct engaged in by rank-and-file employees *solely* because of their status as union officers.

The courts have generally agreed with the Board that that question should be answered in the negative—*i.e.* that it is inherently destructive of an important employee right to impose such additional burdens and penalties on union officers *simply* by virtue of the fact that they hold that office, and that such disparate discipline constitutes unlawful discrimination. *NLRB* v. *South Central Bell Telephone Co.*, No. 81-4159 (5th Cir. Oct. 4, 1982), slip op. 60; *Szewczuga* v. *NLRB*, *supra*, 686 F.2d at 973;

[12] Of course, as explained above (page 19, *supra*), where the officers in fact use their positions to provide leadership for the strike, the employer may punish them more severely than it does those who engage in the strike but do not act as strike leaders.

Hammermill Paper Co. v. *NLRB*, *supra*, 658 F.2d at 163-165; *C. H. Heist Corp.* v. *NLRB*, 657 F.2d 178, 181-183 (7th Cir. 1981).[13] As we show below, this construction of the Act takes account of practical constraints on employees holding union office, and it represents a reasonable accommodation between an employer's right to seek to deter work stoppages prohibited by a no-strike clause and the employee's right not to be discouraged from serving as a steward or other union officer. This construction does not preclude the possibility of imposing special responsibilities on the officers by means of the collective bargaining agreement.[14] It recognizes, however, that, to the extent duties

[13] In three of these decisions, the courts of appeals distinguished earlier cases involving disparate discipline of union officers in which the Board's orders finding violations of Section 8(a)(3) and (1) of the Act had been denied enforcement. In *Szewczuga*, the panel distinguished *Fournelle* v. *NLRB*, 670 F.2d 331 (D.C. Cir. 1982), as a case in which the harsher discipline of a union officer was lawful because "'the collective bargaining process ha[d] imposed higher duties upon union officials than [on] the rank and file.'" 686 F.2d at 969, quoting 670 F.2d at 341. Similarly, in *Hammermill* (658 F.2d at 163), the Third Circuit distinguished its opinion in *Gould, Inc.* v. *NLRB*, 237 N.L.R.B. 881 (1978), enforcement denied, 612 F.2d 728 (1979), cert. denied, 449 U.S. 890 (1980), as holding only that, "where a collective bargaining agreement explicitly requires union officers and representatives to use every reasonable effort to terminate an unauthorized 'work stoppage,' an employer may single out for disciplinary discharge a union steward who fails to take affirmative steps to terminate that work stoppage." Finally, in *C.H. Heist*, the Seventh Circuit explained (657 F.2d at 181-182) its earlier decision in *Indiana & Michigan Electric Co.* v. *NLRB*, 599 F.2d 227 (1979), as involving a "contractual basis" for imposing higher responsibilities on union stewards than on other employees to end contractually prohibited strikes.

In *NLRB* v. *Armour-Dial, Inc.*, 245 N.L.R.B. 959, enforcement denied, 638 F.2d 51 (8th Cir. 1981), the court of appeals denied enforcement of a Board order in a case involving a similar issue, relying on both *Gould, Inc.* and *Indiana & Michigan Electric*. The case differs from these and all of the other appellate cases involving this discipline issue, however, because the court concluded that the union officers in question had actually "fomented the illegal work stoppage" 638 F.2d at 56.

[14] See note 13, *supra*.

and responsibilities are inherent in the mere holding of union office, those duties are to the union membership and others in the bargaining unit being represented (cf. *Vaca* v. *Sipes*, 386 U.S. 171 (1967)), rather than to the employer. A union officer's inherent duties to his employer arise instead out of the employment relationship, *i.e.*, out of his status as an employee rather than as a union officer.

C. The Board's Application of the Act to the Disparate Discipline of Employees Holding Union Office is Responsive to the Realities of Industrial Life

In answering the question whether an employer commits an unfair labor practice by imposing on his employees the kind of disparate discipline at issue in this case, the Board is engaged in its "special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB* v. *Erie Resistor Corp.*, *supra*, 373 U.S. at 236, citing *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798 (1945), and *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). The positions of the Company and the *amici* in this case take little account of those complexities.

To begin with, the contention of the amicus Edison Electric Institute (EEI Br. 16) that the decisions of the Board and the courts of appeals on this question would "encourag[e] disavowal of no-strike commitments" by employees holding union office ignores the fact, already noted, that under those decisions union officers are not immune from discipline for participating in contractually prohibited work stoppages.

More significantly, suggestions that the alleged special duties inherent in the status of union officer are a simple matter of "stand[ing] up for the contract by taking affirmative steps to induce the employees to return to work" (Pet. Br. 44) or "set[ting] an example for the rest by not participating in the unlawful activity and by attempting to bring about its cessation" (EEI Br. 19-20) disregard the more complicated chemistry of interactions be-

tween union officers and rank-and-file employees in the throes of a wildcat strike. If it were the case that—at a word from a union officer, or by the mere force of his example in crossing a picket line or going to work during a strike—employees bent on a wildcat strike would immediately cease their contractually prohibited activity and continue thereafter to accept the officer's advice in matters concerning their rights and obligations under the collective bargaining agreement, then the threat of *additional* discipline for union officers *might* be seen as an acceptable way for an employer to combat prohibited strikes. The justification for the employer's actions might be said to outweigh the effects on the right to hold union office; for the prospect of holding union office under the threat of special penalties for a failure to take the lead in going back into work during any contractually prohibited work stoppage would not make the choice of assuming union office appear especially dangerous to any leaders who could reasonably expect no difficulties in coping with wildcat strikes.

As noted, however, this facile assumption is false. Unauthorized work stoppages—whether they are an expression of resentments that have built up in the workplace or, as in the present case, are the result of the employees' aversion to crossing another union's picket line—often do not begin under the leadership or control of union officers. Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 Ohio St. L. J. 751, 762-763, 811-812 (1973); Sayles, *Wildcat Strikes*, 32 Harv. Bus. Rev. 42, 50 (1954), citing Paterson & Willett, *Unofficial Strike* 43 The Sociological Rev. 57 (1951).

That wildcat strikes may have a life of their own and that union officers may be powerless to prevent or end them is demonstrated by the facts of the present case and of others that have come before the Board. Here, following the August 4 work stoppage, Union President Lang specifically communicated to the members of the Union at a meeting the legal advice he received from the

International Union—that the employees should have crossed the picket line and gone to work. The response was an accusation that anyone—especially a member of the Union's executive committee—who crossed a picket line was a "scab" and a motion that the membership never cross any picket lines again (J.A. 86, 94). Lang's refusal to accept the motion produced a further uproar that he was unable to control (J.A. 86, 96). As the administrative law judge found (Pet. App. A-43), Union members had come to an informal agreement on the matter of refusing to cross picket lines against "Lang's urgings and advice." Similarly in *C.H. Heist Corp.* v. *NLRB*, *supra*, 657 F.2d at 180, a contractually prohibited walkout occurred despite the steward's previous advice to angry employees that they deal with their problems through the contractual grievance procedures. And in *Miller Brewing Co.*, *supra*, 254 N.L.R.B. at 267, the Board found that the stewards "were caught in a series of events whereby an employer's decision provoked a hostile, and ultimately uncontrollable, reaction against the Employer, the Union, and themselves."

A union officer who is not eager to have his members out on unauthorized strikes in violation of contract and who wishes to curtail such incidents when they occur finds himself in a serious dilemma when he is faced with the prospect of especially severe discipline for failing to go to work while his members are outside refusing to do so. He may, with good reason, believe that complying with this demand of the employer will not only destroy the credibility of his authority with respect to any further controversies but will also prevent him from taking steps that he has reason to believe will bring the work stoppage more quickly to an end. Union officers "must walk a narrow line between 'responsibility' and 'selling out the membership'" (Atleson, *Work Group Behavior*, *supra*, 34 Ohio St. L. J. at 810) and are wary of finding themselves labeled a "'company stooge'" (Sayles, *Wildcat Strikes*, *supra*, 32 Harv. Bus. Rev. at 50). And, on

some occasions, accompanying the membership on a walkout may be the more responsible course. Thus, in *Miller Brewing Co., supra*, 254 N.L.R.B. at 266, the stewards—on the advice of the union's business agent—accompanied a group of angry employees to the union hall, trying "to keep them together as a single group." As the court of appeals, in its opinion enforcing the Board's order, noted (686 F.2d at 968), "[t]o the extent that the stewards helped to keep the walkout orderly, they helped to bring about its speedy conclusion."

The circumstances in the present case were somewhat similar: Union President Lang was aware that, during the August 4 incident, some employees who had refused to cross the picket line had not gone to work that day at all but instead "had gone drinking" (J.A. 86), and this was less likely to happen when the employees assembled at the Union hall. Despite his earlier statement to rank-and-file members that they had no right to honor such picket lines, Lang knew that "[his] people would not go in" when they saw the picket line. He further believed that he could bring the work stoppage to an end more readily by staying out and attempting to get the picketers to leave rather than by crossing the picket line himself (J.A. 89).[15] As the Seventh Circuit noted in an

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[15] The intensity of feeling on the part of some of the employees concerning the question of honoring the Operating Engineers' picket line reflects an ingrained viewpoint in the American labor movement respecting one union's support of another. Harper, *Union Waiver of Employee Rights Union the NLRA: Part I*, 4 Indus. Rel. L. J. 335, 372-373 (1981). See also *NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-506 (2d Cir. 1942). In this regard, Personnel Director Hombach testified (Tr. 53) that Union President Lang told him that respecting the Operating Engineers' picket line would make it likely that the Operating Engineers would respect the Union's picket lines if the Union later went on strike. Lang did not report having made such a remark, but, in any event, if such a conversation occurred, it may well have represented Lang's attempt to explain to Hombach why the rank-and-file employees were stubbornly refusing to cross the picket line. Such sentiments do not excuse the violation of a no-strike clause (for which, as noted above

analogous situation in *C.H. Heist Corp.* v. *NLRB*, *supra*, 657 F.2d at 183: "To have taken that extra step would have been suicidal to his union stewardship and his capacity to enforce any provision of the bargaining contract."

In sum, a union officer whose employer has threatened to impose especially severe discipline on all officers who fail to follow the employer's own prescription for the proper exercise of union office during a contractually-prohibited work stoppage finds himself in the following dilemma:

> Confronted with threats to his leadership position and confronted with an unauthorized stoppage brought about by the activities of unauthorized leaders, the average union steward finds himself between two fires. If he fails to "run with the crowd," he may shortly find himself out of office. If he does run with them, he may shortly find himself out of employment.

Yaffe, *The Protected Rights of the Union Steward*, 23 Indus. & Lab. Rel. Rev. 483, 493 n.28 (1970), quoting Gabriel Alexander, *Management Rights and the Arbitration Process, Proceedings of the Ninth Annual Meeting of the National Academy of Arbitrators.*

It is thus not unreasonable to conclude that—at least absent contractual waiver by the union—an employer discourages union membership in violation of Section 8(a)(3) of the Act when he imposes on union officers discipline above and beyond what he is free to impose on every employee, including any union officer, who engages in a contractually prohibited work stoppage. One need not merely hypothesize the deterrent effect of such disparate discipline on holding union office, for examples are readily at hand. The steward involved in *C.H. Heist Corp.*, *supra*, 250 N.L.R.B. at 1402, perhaps fearful of the selective discipline that was to come, announced his

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(page 19, *supra*), the employer may impose discipline without infringing any rights protected under the Act), but they explain the difficulty a union officer often has in controlling such conduct.

resignation as steward when the wildcat strike drew to a close. In *Szewczuga* v. *NLRB*, *supra* (686 F.2d at 973; footnote omitted), after the employer announced the discharge of two union stewards for their role in the walkout, another steward resigned his union post, "and since then the union has been unable to persuade any of its members to serve as stewards." In the present case, Union President Lang, when informed by the Company that his participation in any future work stoppage would result in his discharge, sought employment elsewhere because "being a family man I could not allow myself to be in that situation" (J.A. 80).

Finally, it is not the case, as the Company suggests (Pet. Br. 41), that pursuing a policy of disparate discipline that discourages employees from seeking union office should be lawful so long as the Board permits employers and unions to agree on and enforce contractual clauses that give certain employment *preferences* to union officers (usually plant stewards) who have grievance handling obligations. Such favorable treatment is permitted only to the extent that it is necessary to accommodate the union's " 'legitimate and substantial' " need to have grievance-handling performed in the plant at times when grievance controversies are likely to arise. *NLRB* v. *Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162, 1166 (2d Cir. 1976), quoting *NLRB* v. *Great Dane Trailers, Inc.*, *supra*, 388 U.S. at 34. Where a contractual provision gives a union steward job benefits beyond preferences respecting layoff and recall, it is presumptively unlawful; and if it appears that a contractual clause grants job benefits to union stewards "only because they are union stewards," it will be found violative of Sections 8(a)(3) and (1) and 8(b)(2) and (1)(A) of the Act, 29 U.S.C. 158(a)(3) and (1) and 29 U.S.C. 158(b)(2) and (1)(A). *Dairylea Corporative, Inc.*, 219 N.L.R.B. 656, 657 (1975), enforced, *NLRB* v. *Milk Drivers & Dairy Employees, Local 338*, *supra*. Accord, *Teamsters Local 20* v. *NLRB*, 610 F.2d 991 (D.C. Cir. 1979); *W.R. Grace & Co.*, 230 N.L.R.B. 259 (1977).

The *Dairylea* rule, if anything, supports the rationale for the Board's rule that an employer may not *unilaterally* impose harsher discipline on union officers in connection with contractually prohibited work stoppages simply because those individuals hold union office. The employer possesses the right, as noted, to discipline all employees, including union officers, for engaging in such work stoppages and to punish actual strike leaders more harshly. There is no substantial justification for permitting further punishment of certain employees "only because they are union [officers]," at least in the absence of a clear contractual waiver by the union.

II. THE BOARD REASONABLY DECLINED TO DEFER TO THE DECISIONS OF ARBITRATORS CONSTRUING THE GENERAL NO-STRIKE CLAUSE OF PRIOR COLLECTIVE BARGAINING AGREEMENTS AS IMPOSING SPECIAL OBLIGATIONS RESPECTING CONTRACTUALLY PROHIBITED WORK STOPPAGES ON EMPLOYEES HOLDING UNION OFFICE AND THEREBY PERMITTING THEM TO BE PUNISHED MORE SEVERELY THAN OTHER EMPLOYEES FOR PARTICIPATION IN SUCH WORK STOPPAGES

As we have shown, the Board and four courts of appeals have reasonably construed Section 7 of the Act, 29 U.S.C. 157, as conferring on employees a right not to be subjected to increased penalties for particular conduct —such as participating in a contractually prohibited work stoppage—solely because they are union officers; and, accordingly, they have concluded that an employer violates Section 8(a)(3) and (1) of the Act if he imposes such disparate discipline on the theory that union officers inherently have a greater obligation to refrain from violating the collective bargaining agreement and to seek to dissuade others from violating it.

To be sure, some statutory rights may be waived. Compare, *e.g.*, *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71 (1953) (right to engage in sympathy strike waiv-

able), with *NLRB* v. *Magnavox Co.*, 415 U.S. 322 (1974) (employees' right to distribute literature in nonwork areas of plant in nonwork time is not waivable). The Board has reserved judgment on the question whether a collective bargaining representative may waive the right of employees holding union office not to be subjected to disparate discipline of the kind at issue here.[16] All

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[16] In *Super Valu Xenia*, 228 N.L.R.B. 1254, 1259 (1977), the Board upheld discipline of union officers where the contract expressly permitted the employer to discharge stewards for failing to " 'undertake every reasonable means to induce [striking] employees to return to their job[s].' " But the viability of that case as precedent for the waivability of union officers' right to be free of disparate discipline was put in doubt by such later cases as *Gould, Inc.*, 237 N.L.R.B. 881 (1978), enforcement denied, 612 F.2d 728 (3d Cir. 1979), cert. denied, 449 U.S. 890 (1980), in which discipline of a steward for breach of a no-strike clause was found violative of the Act notwithstanding a contract clause specifying the responsibilities of union stewards. In *Armour-Dial, Inc.*, 245 N.L.R.B. 959, 960 n.8 (1979), enforcement denied, 638 F.2d 51 (8th Cir. 1981), the Board expressly stated that it was declining to reach the question "whether a union could, by contract, waive an employee's right to engage in protected concerted activity through the holding of union office by providing for the discipline of union officials."

Recently, in *Consolidation Coal Co.*, 263 N.L.R.B. No. 188, 111 L.R.R.M. (BNA) 1205 (Sept. 20, 1982) (Chairman Van de Water and Member Hunter dissenting), the Board held that the employer violated Section 8(a)(3) and (1) of the Act by disciplining two union committeemen more severely than rank-and-file employees for participation in a contractually prohibited work stoppage. An arbitrator had found that the two men had not in any way instigated the strike, but he nonetheless upheld the discipline as a justified punishment for violation of their duties as union officers. 111 L.R.R.M. at 1206. The Board's opinion does not address the question whether the right to hold union office without becoming subject to a more stringent disciplinary standard can be waived by a union, and Member Fanning (111 L.R.R.M. at 1210 n.18) observed that it was unnecessary to decide that question because there was no contract provision placing any affirmative obligations upon union agents. However, Member Zimmerman specifically rested his concurrence on the fact that the bargaining agreement contained no "express provision which requires union officers to take affirmative steps to prevent or curtail unauthorized work stoppages," and indicated

the courts of appeals that have considered the issue, including the court below, however, have either explicitly or implicitly concluded that the right may be waived in a collective bargaining agreement. Pet. App. A-5 to A-6; *NLRB* v. *South Central Bell Telephone Co.*, *supra*, slip op. 57, 60-61; *Fournelle* v. *NLRB*, 670 F.2d 331, 340 (D.C. Cir. 1982); *C.H. Heist Corp.* v. *NLRB*, 657 F.2d 178 (7th Cir. 1981).[17]

It is unnecessary, however, for this Court to decide whether the right to be free from the disparate discipline at issue here is waivable; for, as we show below (pages 34-43, *infra*), no contractual waiver has been shown. Moreover, as we also show (pages 43-45, *infra*), in determining whether that conclusion respecting waiver may be upheld, the Court need not resolve general questions concerning the duty of one arbitrator to consider himself bound by the decision of a prior arbitrator, notwithstanding the Company's reliance in this case on two arbitral

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that he would uphold augmented discipline for union officers where such obligations were contractually specified. 111 L.R.R.M. at 1210-1212. Chairman Van de Water, dissenting, indicated that he regarded participation by a union officer in a contractually prohibited work stoppage as inherently more serious than participation by other employees and therefore a proper basis for disparate discipline without regard to the presence of any contractual clause specifying particular duties for the officers (111 L.R.R.M. at 1212-1215). Member Hunter, implicitly finding the statutory right waivable, would find implicit in any no-strike obligation a special undertaking by union officers not to violate the clause. 111 L.R.R.M. at 1215-1221. Because the dissenters thus did not find the arbitrator's decision upholding the discipline imposed on the committeemen to be repugnant to the Act, they would have deferred to that arbitral award.

[17] The Eighth Circuit did not address this question in *NLRB* v. *Armour-Dial, Inc.*, 638 F.2d 51 (1981). As noted above (page 24, note 13, *supra*), that opinion contained language suggesting that union officers inherently shoulder heavier obligations that can subject them to heavier discipline, but its holding is obscure because the court found that the officers in question had themselves "fomented the illegal work stoppage" 638 F.2d at 56.

awards under collective bargaining agreements that preceded the agreement in effect during the events at issue. The question is not whether one arbitrator should read a collective bargaining agreement (or a successor agreement) in exactly the same manner as arbitrators who preceded him, but rather whether a particular agreement, in the light of arbitral constructions of prior agreements, constitutes evidence of a waiver of a particular employee right under the Act that meets the waiver standard generally applied by the Board and the courts. See *NLRB* v. *South Central Bell Telephone Co.*, *supra*, slip op. 53-54, 57-58 n. 8.

A. A Waiver that is Not Clear and Unmistakable Will Not Suffice to Validate Disparate Discipline Based on the Holding of Union Office

In *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956), this Court was called upon to decide whether a contract clause providing, *inter alia*, that "[t]he Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement" was a sufficiently clear waiver of the right of employees to engage in a strike in protest of their employer's unfair labor practices. 350 U.S. at 281. Notwithstanding the literal application of the clause to "any strike or work stoppage," the Court concluded that, even assuming the right to be waivable, the clause did not waive the right in question. Noting that the contract dealt only with "the economic relationship between the employers and their employees," and that reading the clause as broadly as the employer suggested would prevent the employees from striking even in protest of such unfair labor practices as the unlawful ouster of their bargaining representative, the Court held: "Whatever may be said of the legality of such a waiver when explicitly stated, there is no adequate basis for implying its existence without a more compelling expression of it than appears in [the pertinent section] of this contract." *Id.* at 281-283.

In decisions issued after *Mastro Plastics*, the courts of appeals have generally required that any waiver of an employee right under the Act be "clear and unmistakable." *E.g., C & P Telephone Co.* v. *NLRB*, 687 F.2d 633, 636 (2d Cir. 1982) (right to receive information pertinent to grievance processing); *NLRB* v. *Southern California Edison Co.*, 646 F.2d 1352, 1364 (9th Cir. 1981) (right to engage in sympathy strikes); *Communication Workers of America, Local 1051* v. *NLRB*, 644 F.2d 923, 927 (1st Cir. 1981) (grievance processing information); *NL Industries, Inc.* v. *NLRB*, 536 F.2d 786, 789 (8th Cir. 1976) (right to bargain over conditions of employment during term of a contract that does not address the subject in question); *Timken Roller Bearing Co.* v. *NLRB*, 325 F.2d 746, 751 (6th Cir. 1963), cert. denied, 376 U.S. 971 (1964) (right to receive collective bargaining information).

The court below correctly applied this principle in assessing the adequacy of the alleged waiver in the present case (Pet. App. A-8). *NLRB* v. *South Central Bell Telephone Co.*, *supra*, slip op. 60-61; *Szewczuga* v. *NLRB*, *supra*, 686 F.2d at 970; *C.H. Heist Corp.* v. *NLRB*, *supra*, 657 F.2d at 178. Where it is not entirely clear that a union has agreed to the imposition of greater duties on union officers with respect to securing compliance with a no-strike clause—and to the threat of greater employer discipline for violation of such duties—it cannot be assumed that the union has weighed the consequences of such an arrangement and consented to it. That is to say, one cannot assume that the union has made a judgment concerning the potentially destructive effect of a system of disparate discipline on the willingness of employees to take on the burdens of union office or the ability of the bargaining unit to secure leaders other than those who pay little heed to threats of discipline. Similarly, where there is no clear contractual provision, officers may be unsure of the precise nature of the duties that they are expected to fulfill under threats of dis-

cipline.[18] In short, in the absence of precise contractual language, there is nothing to indicate that the threat of disparate discipline would not be inherently destructive of important employee rights.

In any event, we do not understand the Company to contend that, assuming arguendo that a waivable statutory right is at issue in this case, the waiver may be considered valid even if it is less than clear and unmistakable. Rather, the Company appears to argue (Pet. Br. 21, 34-36) that arbitral awards under prior collective bargaining agreements permitting an employer to discipline employees holding union office more severely than other employees for violations of the no-strike clause—together with a general no-strike clause in the existing agreement —manifest a clear and unmistakable waiver by a union of the employees' statutory right not to have the severity of discipline imposed upon them depend upon their decision whether or not to serve in union office. As we shall now show, that argument is unsound.

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[18] "Quite simply, obligations of this magnitude, which carry with them not only the principal responsibility for maintaining stability in the workplace, but also the very real risk of discipline at the hands of the employer and intense resentment on the part of rank-and-file fellow employees, cannot be thrust upon union officers without clear notice to them of such special obligations attendant to their union position." *Consolidation Coal Co., supra*, 111 L.R.R.M. at 1211 (Member Zimmerman, concurring).

Notice given through the results of prior arbitrations dealing with differing kinds of incidents or through unilateral lectures by the employer's officers or supervisors (see Pet. App. A-36 to A-37) is simply not the equivalent of clear language that has been worked out in collective bargaining negotiations and placed in an agreement signed by representatives of both parties. As this case illustrates, the employer's response to union officers who engaged in prohibited work stoppages may not be consistent. The August 4 incident resulted in no discipline to many of the participants, including Lang and Light (see pages 3-4, *supra*). Moreover, even on those prior occasions when the Company dealt more harshly with Union officers, the disparity in discipline was much less than in this case and the sanctions imposed on the officers far less severe (see notes 20, 22, *infra*; J.A. 6, 14-17, 29-32; Pet. App. A-54 to A-55, A-62 to A-63, A-72).

B. A Clear and Unmistakable Waiver of the Right at Issue in this Case is Not Manifested by a General No-Strike Clause or by Arbitral Awards Construing Prior Collective Bargaining Agreements with such Clauses as Permitting Disparate Discipline, Based on the Holding of Union Office, for Violations of the No-Strike Clause

Neither the Company nor the *amici* suggest that there is any language in the applicable collective bargaining agreement to the effect that employees holding union office have special responsibilities under the agreement—to be carried out under threat of discipline more severe than that imposed on other employees. The Chamber of Commerce alludes to, but does not identify, the "collective bargaining language at issue," said to have been "construed" by earlier arbitral decisions (Chamber Br. 21); the Edison Electric Institute suggests (EEI Br. 16) that a special responsibility of stewards is implied in a no-strike commitment; and the Company appears to rely simply on the arbitral awards themselves (Pet. Br. 13-14, 29, 34-36), although its references to the no-strike clause and to "strike-related obligations" (Pet. Br. 13-14, 29) suggest that it can identify no other basis in contract language for imposing the obligations and discipline at issue, either under the present agreement or prior agreements.

The Company's reluctance to rely on the no-strike clause alone is understandable. That provision merely states (Pet. App. A-32; R. Exh. 1, Art XI):

> 11.1 The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public.

The provision makes no reference to union officers; it clearly requires *all* members of the Union to abide by the no-strike commitment. And it contains no suggestion that the Union is waiving anything other than its right

to strike. No court has ever construed such a clause as waiving the statutory right in question, and both the District of Columbia Circuit, in *Szewczuga* v. *NLRB*, *supra*, 686 F.2d at 970, and the Fifth Circuit in *NLRB* v. *South Central Bell Telephone Co.*, *supra*, slip op. 52, 62-63, have squarely held that such a clause is an insufficient waiver.

The heart of the Company's waiver contention, then, lies in two arbitral awards—the Howard Award in May 1973 (Pet. App. A-52 to A-61) and the Seidenberg Award in December 1975 (Pet. App. A-62 to A-72).[19] Essentially, the Company contends that these awards clearly construed prior collective agreements as permitting the kind of disparate discipline at issue here and that, because the agreements have been changed in no material way, the Union has clearly waived the employees' right not to be subjected to discipline on the basis of the holding of union office.

In assessing the contention, it is well to begin with an examination of the basis on which those arbitrators construed the collective bargaining agreement as permitting disparate discipline. In holding that, in the aftermath of a contractually prohibited work stoppage, the Company could impose "more serious discipline" on certain employees "by reason of their Union position" (Pet. App. A-58), Arbitrator Howard did not purport to be construing any particular language in the agreement.[20] Rather, he relied on decisions of other arbitrators—construing collective bargaining agreements negotiated by unions and employers different from the parties before him—

[19] A caption on the Howard Award as reprinted in the appendix to the petition (Pet. App. A-52) contains a typographical error: it should read "International Brotherhood of Electrical Workers, Local 603," not "Local 563."

[20] In that case rank-and-file members were issued warnings and the union officers were assessed five day suspensions, later reduced to three days (Pet. App. A-54 to A-55). Arbitrator Howard upheld the three day suspensions (Pet. App. A-61).

that purported to reflect a general view that "Union officials have an *affirmative duty* to protect the authority of the Union leadership from illegitimate action on the part of the employees, and to uphold the sanctity of the Agreement and its established grievance procedures" and that "[f]ailure to exercise this responsibility subjects them to more serious penalties" (Pet. App. A-60; footnote omitted, emphasis in original). Examination of the cited authorities reveals that some of them relied on the stated general principle in upholding disparate treatment of union officers (*e.g.*, *Vickers, Inc.*, 33 Lab. Arb. (BNA) 594, 600-601 (1959) (Bothwell, Arb.)), while two of them relied in part on contract language requiring union officers to take affirmative steps to curtail work stoppages (*Philips Industries, Inc.*, 45 Lab. Arb. (BNA) 943 (1965) (Stouffer, Arb.); *American Hoist & Derrick Co.*, 53 Lab. Arb. (BNA) 45, 50, 58-59 (1969) (Stouffer, Arb.)). Arbitrator Howard did not cite any of the existing contrary precedents, in which arbitrators had declined to uphold extra discipline for union officers;[21] but in one of the cases he did cite, *International Harvester*, 14 Lab. Arb. (BNA) 986 (1950) (Seward, Arb.), the arbitrator included a final section titled "Dangers of Misinterpreting Instant Decision," in which the following limitations on the holding were stated (*id.* at 989; emphasis in original):

> 1. This is *not* a decision that if a Union steward endeavors in good faith to prevent a stoppage, the mere fact that he thereafter goes along with it justifies a more severe penalty than is imposed on the other employees.
>
> 2. This is *not* a decision that Management or its Supervisors may properly dictate to Union officials the methods and measures they must adopt in dealing with a stoppage.

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[21] E.g., *International Shoe Co.*, 45 Lab. Arb. (BNA) 81 (1965) (Larkin, Arb.); *Pittsburgh Standard Conduit Co.*, 33 Lab. Arb. (BNA) 807 (1959) (McCoy, Arb.); *American Airlines, Inc.*, 31 Lab. Arb. (BNA) 144 (1958) (Gray, Arb.).

> 3. This is *not* a decision that a Union representative who neither instigates nor participates in a stoppage ma[y] properly be disciplined because he does not take affirmative action to stop it.
>
> 4. This is *not* a decision that if it is once established that a Union representative participated in a work stoppage, Management thereafter has unlimited discretion in determining his discipline, free from any requirement to consider mitigating circumstances or to see that its penalties are reasonable and fair.

Obviously, if an arbitrator had applied the rule of *International Harvester* in the present case, he might have declined to uphold the discipline of Union President Lang, since he could have found that Lang had attempted in good faith at the Union's meetings and in his early morning activities on August 30 to head off the work stoppage and was guilty only of going along with it after it appeared inevitable.

But what is more significant for the purposes of the issue in this case is that Arbitrator Howard's award singled out no language in the contract giving rise to special duties for union officers or their vulnerability to increased discipline, and the cases he cited likewise provided no guide as to what part of the agreement was critical. Arbitrator Seidenberg's award in 1975 upholding similar discipline [22] was similarly silent on this point, citing the no-strike clause only as the provision that made the work stoppage in question illegal (Pet. App. A-63). It seems plain, therefore, that had the arbitrators been charged with deciding whether the Union had clearly and unmistakably waived rights enjoyed by em-

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[22] Following the incident that give rise to Arbitrator Seidenberg's decision, 15 employees received a written warning, 47 employees (who had participated in a prior work stoppage) received one day suspensions, and three union officers received three day suspensions (Pet. App. A-62 to A-63). Arbitrator Seidenberg upheld the three day suspension of one officer and reduced the suspensions of the other two to one day (*id.* at A-72).

ployees under the National Labor Relations Act not to be dealt with more severely because of their union office, the arbitrators would have had considerable difficulty in finding evidence of such a waiver in the contract they were construing; and the varying rationales of the cited opinions of other arbitrators would hardly supply the missing evidence.

The Company, however, suggests (Pet. Br. 30) that, although the Union may never have waived the right to begin with, it did so by inaction, in failing to alter agreements negotiated subsequent to the Howard award. A problem with this argument, however, is that, since there was no specific language in the agreement that might constitute a waiver in the first place, there was nothing that could be removed. Thus, according to the Company's theory, in order to avoid waiving the statutory right in question, the Union would be required to write a *disclaimer* of waiver into the agreement—*e.g.*, to specify that union officers may *not* be disciplined more harshly than other employees for participating in a work stoppage or failing to take steps to curtail work stoppages. By thus suggesting that the Union can avoid a waiver of employees' statutory rights only by disclaiming waiver in clear and unmistakable language, the Company stands the applicable principle on its head.[23] A related problem

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[23] The Company is therefore mistaken in relying (Pet. Br. 30) on *Carbon Fuel Co.* v. *UMW*, 444 U.S. 212, 222 (1979), for the proposition that the later agreements necessarily subsumed the principle announced by Arbitrator Howard and that in those agreements the Union clearly and unmistakably waived rights of the employees under the Act. In *Carbon Fuel*, the Court observed (*id.* at 221-222) that, where (1) the union and the employer had reached agreements that *omitted* a clause contained in prior agreements, (2) courts had recognized the force of that omission in construing the later agreements, and (3) the parties had not reinstated the omitted provision, the parties' failure to make explicit any understanding contrary to those judicial interpretations "strongly suggests the parties incorporated the courts' interpretation of the agreements." But here there is no history of any such deleted provision, and the question

with the Company's position is that it is essentially relying on silence in the agreement. As the Fifth Circuit has pointed out (*NLRB* v. *South Central Bell Telephone Co.*, *supra*, slip op. 58), "judicial interpretation of silence in a document or in a law is always a tricky and controversial undertaking[,]" and should not be "dispositive of the parties' intent in a labor contract."

Finally, even accepting the contention of the Company (Pet. Br. 24-27, 30) that, as a general rule, an arbitral decision construing a particular collective bargaining agreement will be followed by other arbitrators interpreting either that agreement or subsequent agreements that are not altered in any way that affects the issue, the uncertainties are still sufficiently numerous to make it unreasonable to rely on the awards of Arbitrators Howard and Seidenberg as clear and unmistakable evidence of the Union's waiver of the statutory right at issue. Since, as explained above, it was apparently the agreement as a whole—and not particular language used in it—that supported the earlier awards, a later arbitrator might decline to follow the earlier awards on the theory that the agreement as a whole has not remained the same. An arbitrator might, like the court below (Pet. App. A-11 to A-12), determine that the contractual provision declaring that "[a] decision [by an arbitrator] shall be binding * * * for the term of this Agreement" (R. Exh. 1, Art. IX, Section 9.2, 4th para.) relieves him of any necessity of following awards issued under prior agreements. Or an arbitrator might decide that he was free to apply the limiting conditions stated in the award in *International Harvester*, *supra*, since Arbitrator Howard had cited that opinion.

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is whether a party has clearly and unmistakably waived certain statutory rights. In *Carbon Fuel*, no such rights under the Act were at issue, and it was enough that the evidence "strongly *suggested*" that the parties to the agreement had incorporated the prior judicial construction.

In sum, the mere fact that an arbitrator construing the agreement in effect when the events at issue occurred might be likely to follow the Howard and Seidenberg awards in determining the validity of disparate discipline of the kind at issue in this case is not a sufficient basis for concluding that, in that particular collective bargaining agreement, the Union clearly and unmistakably waived the statutory right of employees not to have the severity of discipline imposed upon them depend upon whether or not they hold union office.

C. In Deciding Whether a Current Collective Bargaining Agreement Contains a Clear and Unmistakable Waiver, the Board is not Required to Defer to Arbitral Awards Construing Prior Agreements in Which the Arbitrators Considered Neither Whether the Act Confers the Employee Right in Question Nor Whether the Union Clearly and Unmistakably Waived the Right

The Company (Pet. Br. 27-29) and two of the *amici* (Miller Br. 24-26; Chamber Br. 21-25) also suggest that the question in this case is whether the Board and the court of appeals improperly failed to defer to, or to consider themselves bound by, the arbitral constructions of the prior agreements with respect to discipline of union officers. Their contentions that the Board and the court were bound to follow those arbitral awards reflect a misunderstanding of the relationship between arbitral decisions and Board rulings under the National Labor Relations Act and are, in addition, based on the false premise that the Board in this case was resolving an issue already decided by Arbitrator Howard, followed by Arbitrator Seidenberg.

Section 10(a) of the Act, 29 U.S.C. 160(a), expressly provides that the Board's power to prevent persons from engaging in unfair labor practices is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Thus, while arbitrators are free to decide con-

tract questions that may also arise in Board unfair labor practice controversies, the Board's authority is in no way displaced by an arbitrator's resolution of a matter. *NLRB* v. *South Central Bell Telephone Co.*, *supra*, slip op. 54, 59. The Board, in its discretion, has established a policy of deferring to an arbitral decision where certain conditions are met—principally, where the proceedings have been "fair and regular," the parties have agreed to be bound, and the decision is "not clearly repugnant to the purposes and policies of the Act" (*Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955)) and where the statutory issue raised by the unfair labor practice complaint has been considered and decided by the arbitrator (*Suburban Motor Freight, Inc.*, 247 N.L.R.B. 146, 146-147 (1980)). If the Board, in a reasonable application of its deferral standards, reaches a result contrary to that of an arbitrator, the Board's ruling "take[s] precedence" (*Carey* v. *Westinghouse*, 375 U.S. 261, 272 (1964)), and it is entitled to stand so long as it represents a tenable construction of the Act and meets the substantial evidence standard. See also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974).[24]

Here, the established deferral standards have not been met since Arbitrator Howard (followed by Arbitrator Seidenberg) neither considered nor decided the critical statutory question; even assuming they had done so *sub silentio*, their decisions would not have satisfied the rule requiring a clear and unmistakable waiver of statutory rights.

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[24] In suggesting that the Board and the court below were bound by the arbitral awards, the Company is, in part, confusing the role of a court in deciding whether to enforce an arbitration award with the role of the Board and a reviewing court in determining whether an unfair labor practice has been committed, and, as part of that determination, interpreting contractual provisions that have also been construed in a particular arbitral award. See *NLRB* v. *South Central Bell Telephone Co.*, *supra*, slip op. 53-54; Comment, *Judicial Review and the Trend Toward More Stringent NLRB Standards on Arbitral Deferrals*, 129 U. Pa. L. Rev. 738, 751-753 (1981).

The question before Arbitrator Howard was merely whether a basis for permitting the Company's disparate discipline might somehow be discerned in the collective bargaining agreement. In making that determination, he was not confined by any rule requiring a demonstration that the union had clearly and unmistakably manifested its intent to permit such discipline. Although, as this Court has cautioned, arbitrators do not "sit to dispense [their] own brand of industrial justice," they are free to look for guidance from "many sources," and an award will be "legitimate only so long as it draws its essence from the collective bargaining agreement." *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Thus, Arbitrators Howard and Seidenberg were not concerned with any rights the employees might possess under the National Labor Relations Act or with what evidence might be required, in controversies arising under the Act, to show that the Union had waived those rights. They were concerned only with what rights and obligations might be inferred from the collective bargaining agreement, however vague or general its terms.

In sum, the arbitrators did not decide the statutory issue and, in construing the collective bargaining agreement, did not apply the standard that would be required for deciding the waiver question in a manner that would not be "repugnant to the purposes and policies of the Act." *Spielberg Manufacturing Co.*, *supra*, 112 N.L.R.B. at 1082. Accordingly, the Board properly declined (Pet. App. A-39 to A-40) to consider the two arbitral awards as binding authority with respect to the question whether the Union had clearly and unmistakably waived the rights of the employees not to suffer penalties based on their participation in protected activities—*i.e.*, not to be subjected to discipline solely because of their status as union officers.[25]

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[25] The Company invokes an irrelevancy when it suggests (Pet. Br. 35) that, by entering into a stipulation that the employees' refusal to cross the Operating Engineers' picket line violated the no-strike

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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clause, the General Counsel demonstrated his belief that a prior arbitration award applying the no-strike clause to sympathy strikes constituted an adequate waiver of the employees' right to engage in such actions. Counsel for the General Counsel may have entered into that stipulation simply because the charging party Union did not press the matter in its charge. His reasons, however, are not revealed in the record. Moreover, the Board is not bound by any unexpressed understandings of the General Counsel, and it had no occasion to pass on any issues underlying this unchallenged stipulation. Cf. *United States Steel Corp.*, 264 N.L.R.B. No. 10, 111 L.R.R.M. (BNA) 1200 (Sept. 24, 1982).

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Respondent's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL UNION 563, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-664

METROPOLITAN EDISON COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL UNION 563, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR LOCAL UNION 563, IBEW

This brief is the joint product of respondent Local Union 563, International Brotherhood of Electrical Workers (IBEW), and of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation of national and international unions with which the IBEW is affiliated. The decision to file a single brief reflects the identity of their views on the issues presented, and their desire to minimize the burdens on the Court by stating their common position once and not twice.

The opinions below, the basis of this Court's jurisdiction, the statutes involved and the statement of the case are all fully set out in the National Labor Relations Board's brief. So as not to duplicate that which has already been done, we incorporate those portions of the Board's brief by reference.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The conduct for which the employee-union officials in this case were subjected to enhanced discipline was identical to that engaged in by other rank-and-file employees who were less severely disciplined. Like the other employees, the employee-union officials "fail[ed] to report to work as scheduled and participat[ed] in an unlawful work stoppage." Appendix to Petition ("Pet. App.") 33.[1] The Company, it is true, purported to identify some independent basis for the more severe sanction—*viz.*, "failure . . . to demonstrate to the Company, in an objective manner [fulfillment of] your affirmative duty as an elected officer." *Id.* In terms of what happened at the time, as opposed to what legal tags ("your affirmative duty as a union officer") may be attached to those happenings, however, that "failure" consisted of precisely the same "failure" upon which the discipline of the other rank-and-file employees was based—*viz.*, "fail[ure] to . . . report to work." *Id.*

The proposition that it is ordinarily an unfair labor practice to differentially discipline an employee who is also a union officer for conduct identical to that engaged in by other employees is scarcely a novel one, nearly forty years into the development of the National Labor Relations Act. Indeed, the applicable principle was given form in one of the first cases decided by this Court under the Act, *Labor Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333.

In *Mackay Radio*, the employer singled out "[f]ive strikers who were prominent in the activities of the union" (*id.* at 339) and denied them reinstatement after an economic strike; all other striking employees were re-

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[1] It was stipulated that the failure to cross another union's picket line was in violation of the general contractual no-strike clause. Pet. App. 33. There is consequently no dispute in this case in this regard. *Compare, Buffalo Forge v. Steelworkers*, 428 U.S. 397, 405.

instated. The Court held that none of the striking employees had a right to reinstatement under the NLRA superior to the employment rights of permanent replacements who had been hired during the strike:

> [R]espondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the grounds of skill and ability . . . It might have resorted to any one of a number of methods of determining which of its striking employees would have to wait because five men had taken permanent positions during the strike. [304 U.S. at 347.]

The Court also held, however, that it was nonetheless a violation of the Act to "keep[] out certain of the [strikers] for the sole reason that they had been the most active in the union." *Id.* at 347.

Three reasons have been suggested by the Company as to why the principle stated in *Mackay Radio* is not determinative of this case.

The first is that the strike in *Mackay Radio* was independently protected by the Act, even though the Act does not provide economic strikers an absolute right to be reinstated. The determinative difference here, it is claimed, is that the work stoppage was in breach of a contractual no-strike commitment and hence was not protected by the Act. *Complete Auto Transit v. Reis*, 451 U.S. 401, 412. But as the language, legislative history and administrative and judicial interpretation of § 8(a)(3) show, the protection accorded by that section has never been, and cannot be, limited to situations in which the disciplined employee is engaged in conduct independently protected by the Act. To read such a limitation into the Act is fundamentally to misunderstand the office of the "nondiscrimination" rule stated in § 8(a)(3). *See* Part IA, *infra*.

The second claimed distinction between this case and *Mackay Radio*, and the one stressed by the Company in

this case, is that since a breach of a contractual no-strike commitment is involved, there is a legitimate justification for singling out employee-union officials for enhanced employer discipline. That justification is said to be that employees selected for union office by their co-workers somehow acquire with their office a special obligation to their *employer*, enforceable by *employer discipline*, to abide by all the terms of the collective bargaining agreement, and most particularly by the terms of the no-strike clause, and to encourage other employees to do so in a manner acceptable to the employer. But neither the text of the NLRA nor its underlying policy provides any basis for implying such an obligation. To the contrary, to create such a duty would clash with two fundamental and related precepts of the Act. First, each employee has a right to be active in a labor organization without being subject to adverse employer action that compromises his or her employment security (*see* §§ 7 & 8(a)(3)). Second, the only loyalty owed by an employee-union official *when acting as a union official* is to the bargaining unit employees as a group (*see* §§ 7 & 8(a)(1), (2) and (3) of the Act), just as the only loyalty owed by the employer's collective bargaining representatives is to the employer (*see* §§ 2(3), 8(b)(1)(B) and 14(a) of the Act). To create any special obligation of union officials *qua* employees to their employer is, consequently, to compromise both individual and collective rights central to the Act's basic scheme. *See* Part IB, *infra*.

Finally, there is the Company's notion that this is a case, unlike *Mackay Radio*, in which the parties to a collective bargaining agreement have agreed to impose upon employee-union officials, as such, special obligations, running to the employer, and enforceable by employer discipline. But even if there were an agreement imposing those sorts of obligations, such an agreement could not, consistent with the Act, be given effect. For although char-

acterized as an undertaking to impose obligations upon employee-union officials, such an agreement between a union and an employer indisputably breaches the barrier between an employee's union activity and his or her employment security erected by § 8(a)(3). And, the Act does not permit a union and an employer to waive an individual employee's § 8(a)(3) job-protection rights. *See* Part IC, *infra*.

II. Even assuming, however, that the Union could waive the § 8(a)(3) right to be free from adverse employment consequences based on union officer status, there is no such waiver to be found in this case. A waiver of a statutory right will only be found in the "clear and unmistakable" terms of the parties' collective bargaining agreement. Nothing in the agreement between the Company and the Union expressly imposes additional obligations on employee-union officials nor grants the Company the right to discipline them for their conduct in fulfilling their official functions. *See* Part IIA.

While conceding that the agreement does not itself carry a clear and unmistakable waiver, the Company nonetheless contends that the waiver is supplied by two arbitration awards rendered during prior contract terms. In those decisions, the arbitrators upheld the Company in imposing harsher discipline on employee union-officials than on other rank-and-file employees for identical conduct, finding in arbitral law that union officials have affirmative obligations to stop unauthorized strikes.

The question before the arbitrators was whether the Company's conduct contravened its bargaining agreements. In finding no contract violation, the arbitrators were totally unconcerned with, and did not even purport to decide, the questions at issue here, *viz.*, whether the enhanced discipline violated § 8(a)(3), and whether the parties had negotiated a waiver of § 8(a)(3) rights. Thus, the arbitral decisions upon which the Company

seeks to rely provide absolutely no evidence that the parties negotiated a waiver. Nor can the decisions themselves substitute for an actual and intentional waiver by the Union. For, no matter how clear and unmistakable the language of the awards, the arbitrator has no power to waive § 8(a)(3) rights on the Union's behalf. *See* Part II B.

The Company additionally argues that a waiver by acquiescence should be found in the fact that the Union renegotiated the agreement with the Company without attempting to alter any of its provisions to counter the arbitrators' award. The agreement on its face makes clear, however, the effect of an arbitrator's award is limited to the contract term during which the award was rendered. Moreover, silence on a subject cannot be read as positive proof that a party intentionally conceded something in bargaining, particularly when that "something" is a statutory right, waiver of which must be clearly and unmistakably shown. *See* Part II C.

ARGUMENT

I. EMPLOYEES HAVE A RIGHT UNDER THE NLRA TO HOLD UNION OFFICE WITHOUT BEING DISCIPLINED BY THEIR EMPLOYER FOR THE MANNER IN WHICH THEY DISCHARGE THEIR UNION RESPONSIBILITIES

A. Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7." That unfair labor practice by its terms covers *all* situations in which employer discipline is an avowed direct response to concerted activity protected by § 7.

Section 3(a)(3) of the Act, in turn, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage

membership in any labor organization."[2] The sponsors of the Wagner Act explained the decision to specify that additional unfair labor practice in the following terms:

> Of course, nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work. [S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess. 11; *see also id.* at 6.]

Both this legislative history and *Mackay Radio* demonstrate that § 8(a)(3) has its primary application in situations *other* than those in which employer discipline is an avowed direct response to a particular exercise of a § 7 right. For example, in *Mackay Radio*, had the Court determined that refusal to reinstate economic strikers is, without more, an interference with or restraint upon protected § 7 rights, the question whether there was impermissible discrimination under § 8(a)(3) against certain of the strikers because of their general leadership role in the union need not have been resolved. The five employees in question would have been reinstated as of right simply because, in violation of § 8(a)(1)'s plain terms, they had suffered adverse employer action for engaging in protected activity. Only because economic strikers have no protected right to be reinstated in their jobs if they are replaced did the question as to whether

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[2] As *Mackay Radio* illustrates, and as the Court later confirmed in *Radio Officers v. Labor Board*, 347 U.S. 17, 38-42, § 8(a)(3) does not protect only the bare right to be a union member, but also the right to be a leader in the effort of employees to join together "for the purposes of collective bargaining or other mutual aid or protection." *See also Associated Press v. Labor Board*, 301 U.S. 103, 123.

there had been discrimination based on union status arise. Seen in this light, it becomes clear that the question whether the underlying activity in *Mackay Radio* was protected was irrelevant to the determination of whether a violation of § 8(a)(3) had been committed.[3]

Similarly, the 1935 Senate Report suggests that § 8(a)(3)'s function is to protect employees in situations in which an employer *may* have grounds to act on the basis of "lack of competence" or of "non-performance," but labels a particular employee whose job performance is not readily distinguishable from his or her coworkers as "incompetent" or "unsatisfactory in performance" because of that employee's union membership or degree of union activism. *See also, e.g., Associated Press, supra,* 301 U.S. at 132. And, of course, being incompetent or indolent is no more affirmatively protected by the NLRA than is a violation of legitimate industrial rules. Thus, as this Court has explained, § 8(a)(3), in certain circumstances, protects "a union leader who has broken shop rules" (*American Ship Bldg. v. Labor Board,* 380 U.S. 300, 311) and who is thereby engaged in activity not affirmatively protected by the Act, as well as a union leader who is in every regard a model employee.

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[3] We hasten to add that whether a strike is protected by § 7 *does* make a difference if the employer selects for enhanced discipline the *actual leaders of the work stoppage.* Where the strike activity is protected, leadership of that activity is, of course, affirmatively sanctioned by the Act as well. Consequently, the employer in *Mackay Radio* would have fared no better in defending an unfair labor practice charge if he had claimed to be selecting employees for denial of reinstatement on the basis of strike leadership rather than on the basis of status as a union leader or officer. In contrast, the NLRB has recognized that *leadership* of an *unprotected* strike *is* a legitimate basis for enhanced discipline. *Midwest Precision Castings Co.,* 244 NLRB 597, 598; *J. P. Wetherby Construction Corp.,* 182 NLRB 690, 695; *University Overland Express, Inc.,* 129 NLRB 82, 92.

The need to provide protection against discrimination in situations where union discipline is, on its face, directed against activity which is not itself protected by the Act, is easily explained. An employer has wide discretion, so far as the NLRA is concerned, as to the proper response to violations of any industrial rule, including a contractual rule requiring a certain level of performance or forbidding work stoppages during the terms of a collective bargaining agreement. The employer may choose to disregard an infraction in a particular instance, to issue a warning or to impose any of a wide range of sanctions. In that very discretion, however, inheres the possibility that its exercise will be based on impermissible considerations of union status, with the consequence that the discipline, in truth, amounts to nothing more than punishment for the exercise of the § 7 right to "form, join or assist labor organizations."[4]

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[4] Thus, the problem addressed by § 8(a)(3) is similar to that implicated in many cases concerning the constitutional equal protection guarantee. The clearest example, perhaps, is *Yick Wo v. Hopkins*, 118 U.S. 356, in which prosecutions under a facially valid criminal statute were held invalid because of the character of the prosecutorial selection process, despite the broad prosecutorial discretion which ordinarily obtains (*Oyler v. Boyles*, 368 U.S. 448, 456). As the Court in *Yick Wo* recognized, where only persons of Asian ancestry are prosecuted although others appear also to have violated a statute, the government has in effect penalized the status of being Asian-American, rather than the act of maintaining an illegal laundry. Similarly, the government may no more make it a crime for only blacks, or only those who advocate collective bargaining, to gamble than it may make it a crime to be black or to advocate collective bargaining; nor may the government achieve the same result by passing a facially valid rule and then enforcing that rule on a proscribed basis. Thus, just as § 8(a)(3) embodies no suggestion of a right to be incompetent or insubordinate in the shop, or to violate contractual agreements of any variety, including a no-strike commitment, *Yick Wo* is not premised on the notion that the Constitution protects the right to commit a crime, or to run a laundry. Rather, the premise of *Yick Wo*, like that of many later equal protection cases, is that the government may not "produce a result which [it] could not command directly" (*Speiser v. Randall*, 357 U.S. 513, 526). *See*, for a useful discussion of the import of *Yick*

While there may be difficult evidentiary issues in many instances concerning "whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization" (*American Ship, supra*, 380 U.S. at 311), there are "circumstances in which the employer's conduct carries with it a [compelling] inference of unlawful intention" (*id.*). In particular,

> where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline is simply being enforced. [*Id.* at 312.]

Wo in the selective prosecution context, *Murgia v. Municipal Court*, 15 Cal. 3d 286, 295-296, —— Cal. Rptr. ——, ——.

[5] There is a suggestion in the Brief *Amicus Curiae* of the Chamber of Commerce of the United States ("Chamber Br.") that, regardless of what may be the case with respect to employer discipline for other industrial infractions, this Court's opinion in *Labor Board v. Fansteel Corp.*, 306 U.S. 240, permits employers to exercise their discretion with regard to discipline for participation in unprotected strikes free of the strictures of § 8(a)(3) of the Act. Chamber Br. at 10, 12 n.2. In *Fansteel*, however, the Court was faced with an entirely different issue. It was contended there that by reinstating a few strikers, however selected, the employer forfeited the right to deny reinstatement to the remainder. 306 U.S. at 259. The Court answered that "[r]espondent stood absolved by the conduct of those engaged in the [unprotected strike] from any duty to reemploy them, but respondent was nevertheless free to . . . offer reemployment if it chose. In so doing, it was simply exercising its normal right to select its employees." *Id.* at 259. The *Fansteel* Court did *not* suggest that the "normal right to select its employees" included the right to discriminate on a basis proscribed by § 8(a)(3)—for example, to deny reinstatement to the union members among the strikers, but to reemploy the nonmembers. Any doubt in this regard was resolved when, a few years later, this Court decided that the Act applies to selection decisions as well as discharge and discipline. *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 181 (§ 8(3) of the Wagner Act made it an unfair labor practice for "an employer subject to the [NLRA] to refuse to hire employees solely because of their affiliations with a labor union").

The employer discipline in this case was clearly of this nature: a large group of employees engaged in an unauthorized work stoppage violative of the collective bargaining agreement. Of that group, the "union leaders" received the most severe discipline, with the threat of discharge if the offense were repeated. Joint Appendix ("J.A.") 16-17. The effect was to put the employee-union officials to precisely the choice § 8(a)(3) is intended to forestall through its "policy [of] insulat[ing] employees' jobs from their organizational rights" (*Radio Officers, supra*, 347 U.S. at 40)—*viz.*, a choice between "imperiling their livelihood" or giving up their union leadership role. *See C. H. Heist Corp.*, 250 NLRB 1400, 1402, *enf'd*, 657 F.2d 178 (C.A. 7); *Szewczuga v. NLRB*, —— F.2d ——, 110 LRRM 3289 (C.A.D.C.); *see also* J.A. 80 (one of the union officials in this case resigned his employment because of the lack of security created by the threatened discharge for engaging in future work stoppages). Like the differential treatment of union leaders in *Mackay Radio*, then, the enhanced discipline of employee-union officials violates the most fundamental protection accorded by § 8(a)(3).

B. The Company here insists, however, that the foregoing analysis leaves out of the calculus a critical consideration—that employee-union officials owe to their employer a special responsibility to abide by the collective bargaining agreement, and to assure that other employees do so. Brief for Petitioner ("Pet. Br.") at 39 *et seq.*; *see also* Pet. App. 25-26 (Member Penello dissenting); *Consolidation Coal Co.*, 263 NLRB No. 188, Sl. Op. at 30-36 (Chairman Van de Water dissenting); *id.* at 46 (Member Hunter dissenting). Various policy rationales are offered to support the proposition that employee-union officials may be held to a higher standard of conduct by their employer with respect to breaches of no-strike clauses.[4] The one specific suggestion as to the source

[4] On the one hand, it is suggested that a union official is, as an empirical matter, the "natural leader" of any strike in which he or she participates. Pet. Br. at 41-42. This thesis, at bottom, rests on

of this supposed special employee-union official obligation is that it is implicit in every no-strike clause. *See e.g., Con-*

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the premise that an employer must be allowed conclusively to presume that any union official in his employ is the instigator of any work stoppage that occurs and in which he participates. Yet, this presumption is in many instances contrary to demonstrable fact:

> [S]trikes in breach of contract . . . [i]n some cases . . . are encouraged or even instigated by union leaders. Often, however, they are true "wildcats"—strikes that arise spontaneously to protest grievances against the company, and occasionally, against the union leadership itself. [*Complete Auto Transit v. Reis, supra*, 451 U.S. at 418 (Powell, J., concurring); *see generally* Atleson, *Work Group Behavior and Wild Cat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 Ohio St. L.J. 751 (1973).]

To allow an employer to presume a leadership role he cannot prove and which may well not exist (as the Board found it did not in this case, Pet. App. A-43) would be to sanction precisely the sort of status-based discrimination in industrial discipline that § 8(a)(3) is designed to eradicate.

There is also alleged the corollary notion that an employee-union official, unlike other employees, has the power derived from his status as a union official, to end the work stoppage, by refusing to participate and by urging others to do so, and therefore owes it to his employer to exercise that power. Again, the empirical foundation underlying this assertion—that employee-union officials retain control over the actions of their fellow employees during strikes which "arise spontaneously" and may grow out of discontent with "the union leadership itself" (*Complete Auto Transit, supra* (Powell J., concurring))—is a dubious one, and one which the Board was therefore not bound to accept. *See*, J.A. 85-86, 94; Pet. App. A-37 to A-38. *Cf., Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 214 & n.1 ("good faith" efforts by a regional subdivision of the United Mine Workers to get wildcat strikers to work, including calling meetings at which the strikers were ordered back to work and threatened with union discipline if they failed to comply "were uniformly unsuccessful").

Finally, there is the assertion that since union office carries certain legal privileges as regards one's employment status, it is only fair that union officers carry commensurate responsibilities. Once more, the premise is faulty: Board law does *not* maintain that employers must abide certain conduct by employee-union officials *while acting in their employee capacity* which would be unacceptable, and punishable, if engaged in by other rank-and-file employees. Rather, the principle is that employers must recognize the dual role of union

solidation Coal Co., Sl. Op. at 46 (Member Hunter dissenting)). This suggestion is belied by *Carbon Fuel*, *supra*. The Court there held that Congress' policy favoring arbitration in lieu of economic force does not justify an implied-in-law "obligation [of a union] to use all reasonable means to prevent and end unauthorized strikes in violation of the collective bargaining agreement." 444 U.S. at 216; *see also*, *id.* at 218. If the union as an entity, the party which entered into the collective bargaining agreement as the principal, has no such obligation as a matter of law, there is no possible basis for imposing a derivative obligation of the same kind upon the union's elected and appointed officials.

The general no-strike clause aside, the source of the employee-union official's enhanced obligation is left unspecified. There is good reason for this silence. Analysis shows there is no such obligation.

The NLRA imposes no legal obligations upon employees *qua* employee whatsoever; rather § 7 confers *rights* upon *employees*, while § 8 imposes legal *obligations* upon *employers and labor organizations*.[7] Further, even if a

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officials in their employ, and refrain from applying industrial rules when such individuals are acting "within the scope of [their] official union functions." *United States Postal Service*, 252 NLRB 624; *see also*, *e.g.*, *Pittsburgh Press Co.*, 234 NLRB 408. And, as far as contractual privileges attached to union office are concerned, recent Board and court cases scrutinize such privileges carefully, holding them violative of § 8(a)(3) if attached to union officer status as such, and valid only if justified by demonstrable functional needs of the union as an entity. *Dairylea Cooperative, Inc.*, 219 NLRB 656, *enf'd*, 531 F.2d 1162 (C.A. 2); *NLRB v. American Can Co.*, 658 F.2d 746 (C.A. 10). Thus, the Board in reviewing the statutory and contractual perquisites of union office, has been mindful of the underlying purpose of § 8(a)(3)—*viz.*, allowing employees to make decisions in their organizational capacity as free from job-related economic influence as possible.

[7] Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186, does deal specifically with certain legal duties of "officer[s], agent[s], representative[s] or employee[s] of . . . labor organization[s]" as such (§ 302(b)(2), 29 U.S.C. § 186(b)(2)). But the responsibility im-

majority of the Board were inclined to do so—which, as has recently been reaffirmed in *Consolidation Coal Co., supra*, the Board is not—implying such a responsibility simply because of a perception that employers need a more adequate means of compelling compliance with a union no-strike commitment (Pet. Br. at 43, *et seq.*) would be beyond the Board's powers. The NLRB has no "general authority to define national labor policy by balancing the competing interests of labor and management." *American Ship, supra*, 380 U.S. at 316. In *Teamsters Local v. Labor Board*, 365 U.S. 667, 674 the Court recognized "There being no express ban of hiring halls in any provision of the Act, those who add one, whether it be the Board or the courts, engage in a legislative act." By the same token, there being no express obligations imposed on employee-union officials in any provision of the Act, those who would add one engage in a legislative act.

Aside from the complete lack of a statutory base, there is an additional defect in the Company's suggestion that the Board must recognize that employee-union officials have a special obligation enforceable by employer discipline to uphold the collective bargaining agreement. To posit such a heightened responsibility, and therefore a heightened exposure to employer discipline, would be squarely inconsistent with the Act's protection of "employee self-organization and the process of collective bargaining from disruptive interferences by employers." *American Ship, supra*, 380 U.S. at 317.

1. As we have seen (Part IA, *supra*), § 8(a)(3) is designed to assure that employers make employment-related determinations on grounds entirely separate from an employee's union activity or lack thereof. That provision's purpose is to "insulate employees' job from their organizational rights." *Radio Officers, supra*, 347 U.S.

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posed by § 302 has a thrust quite the opposite of that of the hypothetical duty posited by the employer in this case: § 302 seeks to *prevent* employers from influencing union officials, not to institutionalize such influence.

at 40. This principle in itself precludes the foisting of additional duties upon employee-union officials, enforceable by adverse employment-related action.

An employer ordinarily has no legitimate means of influencing the actions of a union official who is either a full-time union employee or an employee of another employer, or of requiring that official to take any particular action to abide by a collective bargaining agreement or to assure that others do so. Of course, if such a union official fails to abide by a contractual provision, including a no-strike clause which in explicit terms imposes affirmative obligations upon the union in the event of an unauthorized strike in breach of contract (*see Carbon Fuel, supra*, 444 U.S. at 220-221), the union as an entity may be sued and appropriate relief secured against the union. But because the employer deals with such a union official only in that capacity, the danger of the employer using the employment relationship to compromise the representative's autonomy in his capacity as a union official does not exist. Union official status as such does not, it is therefore plain, create any obligations enforceable by employer discipline for the official to behave in a certain fashion toward employers with whom the union deals.

Thus, an employer who claims the right to impose additional obligations upon those union officials who *are* in his employ with regard to enforcement of a no-strike clause is necessarily seeking the privilege to breach the employee-union official's § 8(a)(3) right to have his employment security insulated from his union status. Because he is both an employee and a union official, that individual is said to have responsibilities, and ones "imperiling his livelihood" if not performed (*Radio Officers, supra*, 347 U.S. at 40), which he would not incur if he served in one capacity or the other but not both.

An example outside the wildcat-strike context helps to sharpen the foregoing point: In *Owens-Corning Fiberglas*, 236 NLRB 479, an employer selectively disciplined

an employee-union official for violating a rule against drinking in the plant, on the ground that given his union position, that employee "was supposed to set an example for other employees." *Id.* Thus, the employer in *Owens* attempted to impose a special duty, flowing from the employee's status as a union official and enforceable by employer discipline, to be a model employee. As the Board correctly concluded, the employer's imposition of this duty indisputably altered that employee-union official's terms and conditions of employment by virtue of his union status, in a manner no less violative of § 8(a)(3) than if the obligation imposed had been to work an extra hour a day, or to labor for less pay, or to produce twice as much an hour.

For present purposes, this case and others of its ilk are identical to *Owens-Corning Fiberglas*. In both instances, hypothesizing a special responsibility devolving upon certain employees only because of their concurrent status as union officials cannot serve to make a core violation of individual § 8(a)(3) rights anything less than a core violation.

2. Because the discrimination in this case was based not on bare union membership but on union leadership status, imposition of a special obligation enforceable through employer discipline clashes not only with the union official's individual § 7 rights, but with those of the employees in the bargaining unit as a whole. Fundamental to the scheme of the Act is the precept that "[e]mployees have as clear a right to organize and *select their representatives* for lawful purposes as the respondent has to organize its business and select its own officers and agents." *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (emphasis supplied). Congress' view both in 1935 and in enacting the Taft-Hartley Amendments in 1947 was that its collective bargaining scheme could operate properly only if the following principle is observed: "no one, whether employer or employee, *need have as his agent one who is obligated to those on the*

other side, or one whom, for *any* reason, he does not trust." H.R. Rep. No. 245, 80th Cong., 1st Sess 17 (Initial emphasis added; second emphasis in original). That view was derived from the experience gained under the Railway Labor Act. As Chief Justice Hughes had said in *Texas & N.O.R. Co. v. Ry. Clerks*, 281 U.S. 548, 569:

> Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme . . . [T]he entire policy of the Act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreement satisfactory to both may be reached and the peace essential to the uninterrupted service of . . . interstate commerce may be maintained.[8]

On the union side, the autonomy of union representatives is assured in §§ 8(a)(2) and (3) of the Act. The autonomy of employer representatives is assured by §§ 2(3) and (11) and 14(a), guaranteeing to employers the right to forbid supervisors from belonging to unions at all, and § 8(b)(1)(B), providing employers with certain protection from union coercion of employer representatives, even where the employer has agreed to permit its representatives to maintain union membership. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267; *Florida Power & Light Co. v. IBEW*, 417 U.S. 790; *American Broadcasting Companies, Inc. v. Writers' Guild*, 437 U.S. 11. *See also General Building Contractors Assn. v. Pennsylvania*, —— U.S. ——, 50 L.W. 4975, 4980 ("The entire process of collective bargaining [under the NLRA] is structured and regulated on the assumption that '[t]he

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[8] While *Texas & N.O.R. Co.* was a Railway Labor Act case, "Congress in enacting the National Labor Relations Act had in mind the experience in the administration of the Railway Labor Act . . . [and] had before it the Railway Clerks case which had emphasized the importance of union recognition in securing collective bargaining." *Labor Board v. Greyhound Lines*, 303 U.S. 261, 266-267.

parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.")

As to both unions and management, the protection from control of its agents by the other party has for some time been recognized as extending beyond free choice in the identity of the agent. The possibility of an impact upon the manner in which a union or management representative might exercise his or her authority has led the Board to devise prophylactic approaches toward insulating one party's agent from influence by the other party. The Board has held that supervisors may ordinarily not serve as union officers or stewards. *Nassau & Suffolk Contractors' Ass'n*, 118 NLRB 174; *ITT Arctic Services*, 238 NLRB 116. Similarly, a union violates § 8(b)(1)(B) not only if the union attempts directly to coerce an employer in the choice of representatives for grievance adjustment and collective bargaining, but also if union discipline is used in a manner deemed likely to influence such a management representative who is also a union member in carrying out his responsibilities for the employer. *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union*, 172 NLRB 2173; *American Broadcasting Co. v. Writers' Guild, supra.*

To posit that employees who are also union officials have a duty to their employer, enforceable by employer discipline, to act as the employer wishes during a strike is to violate this autonomy with a vengeance.

Initially, such a policy may well have the effect of voiding the union's choice of representative, for employees may prove unwilling to serve in positions which endanger their employment security. *See* p. 11, *supra.*

Secondly, as the facts of this case illustrate, the very purpose of enhanced employee discipline in situations of this variety is to require the union official to substitute for his own judgment regarding the best way to fulfill his union responsibilities during an unauthorized strike the judgment of the employer. As even the dissenting

member of the Board recognized (Pet. App. 24), the two officers in this case were engaged, during the entire period of the work stoppage, in attempting to end that strike; it was their view, however, that this could be better done by negotiating the removal of the picket line than by charging across the picket line themselves.

Finally, there is the concommitant consideration that union officials have responsibilities on behalf of the union not only with regard to the immediate situation but with regard to many other matters. Their decision as to how, as officers, to serve their organization during an unauthorized strike must therefore take into account the effect of their decision on union solidarity and effective organization in later situations.

As a "matter of probabilities" (*American Broadcasting Co., supra*, 437 U.S. at 432), then, implication of a duty running from employee-union officials to their employers, to take particular sorts of actions in the event of an unauthorized strike in breach of contract, is at least as likely to influence those officials in their representational capacity as was the union discipline imposed upon supervisors who were union members in *American Broadcasting Companies, supra*. Consequently, the notion that such a duty exists and is a proper basis for distinguishing this case from *Mackay Radio* is not only without affirmative support, but is in conflict with a central premise of the NLRA.

C. The major part of the Company's brief in this case is devoted to the proposition that the employer and union have *agreed* to impose upon employee-union officials special obligations in the event of an unauthorized strike in breach of contract. Pet. Br. at 22-39. Albeit begrudgingly,[9] the Company does appear to concede that such an

[9] At one juncture, the company suggests that

> Properly stated, the question . . . is not whether there has been a waiver of a statutory right as such, but rather, whether the imposition of additional obligations on union officials, *which*

agreement would compromise the employee-union officials' statutory rights, and therefore is enforceable only if there has been a "clear and unmistakable" waiver. Pet. Br. at 21, 22, 34. But the Company does not even acknowledge a threshold question—whether the Act permits a union through collective bargaining to waive an employee's § 8 (a) (3) rights. We submit that such rights are not waivable.

The most recent cases in this Court concerning the waiver of protected employee rights through collective bargaining agreements (*Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270; *NLRB* v. *Magnavox Co.*, 415 U.S. 322), are different in kind from the instant case. The employee-

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moots the 8(a)(3) inquiry, must nevertheless satisfy the waiver standard of "clear and unmistakable language?" [Pet. Br. at 20-21. (Emphasis added.)]

The italicized phrase in this formulation is, of course, the basis for the suggestion that there is no waiver issue properly before the Court. The point made is palpably erroneous. For as we have seen (Part IB(1), *supra*), "imposition of additional obligations upon union officials," enforceable not against the union as an entity but through individual discipline against a union official in his capacity as employee, is itself as violative of § 8(a)(3), as would be the imposition of special employment obligations upon union members alone, or upon those who decline to affiliate with the union.

In connection with the suggestion that there is no § 8(a)(3) discrimination here at all, the Company maintains that the situation in *NLRB v. Wilson Freight Co.*, 604 F.2d 712 (C.A. 1) is analogous. Pet. Br. at 22. *Wilson Freight* concerned employer discipline of a union steward who persisted in purporting to act in his capacity as steward in registering many complaints with various government officials, in the face of a contractural clause strictly limiting the scope of the steward's authority. The problem addressed in *Wilson Freight* is the *obverse* of the one involved here: The parties agreed to record the limits of a particular employee's union responsibilities, so that the employee could not claim to be acting as such *when in fact he was simply operating as an employee*. Only if the steward in *Wilson Freight* had *not* signed his various communiques with his official title would a question be presented similar to that here.

union official, like any other employee, is not a party to a collective bargaining agreement. The employer and the union are the collective bargaining parties. Thus, any surrender of statutory rights by a union in collective bargaining is actually a decision by the employees collectively to forego certain protections, and not a decision by each of the affected employees to forego those protections.[10]

Where the rights surrendered are themselves collective in nature, such as the right to strike, the distinction between the parties to the collective bargaining agreement and the employees who are governed by the agreement is of little moment. Cf. *Mastro Plastics Corp.*, *supra*, 350 U.S., at 280; *Communications Workers Local 1051* v. *NLRB*, 644 F.2d 923 (C.A. 1) (waiver by union of the right to receive information pertinent to the grievance process.) But here, that distinction is critical to a proper appreciation of the problem presented. For the NLRA right purportedly waived is for the benefit of the individual as well as for the benefit of the employee group as a whole (Part I B(2), *supra*). The individual right is akin to that provided by anti-discrimination statutes generally, such as Title VII of the Civil Rights Act, 42 U.S.C. 2000 *et seq.*—*viz.*, it is a right to have determinations regarding one's employment security made upon grounds relevant to one's qualifications as an employee, and not upon proscribed bases involving one's status, whether that basis relates to union leadership, or to race, sex, national origin or religious belief.

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[10] That union officials participated in the contract's negotiation is immaterial. In the first place, the officers who participate in negotiations and those who are on the scene during unauthorized strike activity are by no means always the same; union stewards, for example, are unlikely to be involved in negotiations, and, in some instances, negotiations are conducted at a regional or national level rather than locally. Second, there is a distinction between a union office and the individuals who hold that office; the identity of the affected individuals is by no means held constant during the course of a collective bargaining agreement.

This Court has not had the occasion to address the validity of contractual compromises of the employment security protection accorded by § 8(a)(3) of the Act.[11] Rather, the cases directly confronting the question of when NLRA rights may be alienated by agreement have dealt with the validity of certain workplace rules affecting the interests of the employees generally. But if the question here is analyzed along the lines suggested by *Magnavox*, the most recent "waiver" decision—*viz.*, whether the rights purportedly waived constitute "rights in the economic area," which may be waived, or the rights relating to "full freedom of association," which may not be waived (415 U.S. at 325-326)—the present situation falls on the side of nonwaivability.

The Company's motive was doubtless "economic" in the sense that it viewed the authority to impose enhanced discipline on employee-union officials as an adjunct to the enforcement of a no-strike clause. But *Magnavox* frames the issue in terms of the "rights" of the individual who would suffer the consequences of the waiver. Looked at in that way, the *right* involved—that is, the right to hold union office without being discriminated against as an employee—is central to the associational interest protected by § 7. *See* Part IA, *supra*. Like the comparable Title VII rights noted above, the § 8(a)(3) right is a basic protection for the individual that serves as the bedrock support for the NLRA's system of employee free choice. And there is no indication that Congress intended that basic protection to inure only to the economically strong. Further, insofar as such discipline implicates the values underlying § 8(a)(2) of the Act (Part IB(2),

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[11] The Court has held that the employment security protections stated in Title VII are not waivable:

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. [*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51]

supra), waiving the right to be free of such discipline is plainly beyond the union's capacity. Obviously, a statutory protection against collusion between union and employer may not be voided by agreement between the two offending entities.

The conclusion reached by applying the *Magnavox* test is buttressed by the very language and structure of the Act. Section 8(a)(3) itself contains a proviso stating a particular instance in which a collective bargaining agreement may compromise the employment rights protection accorded by that section—*viz.*, when a valid union security clause is included in the contract.[12] Section 8(b)(2), in turn, makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section . . ." The notion that an employer and a union can, by agreement, make legal discrimination in which an employer may not engage on his own and in which a union may not cause him to engage is too paradoxical to be attributed to Congress. Two wrongs do not make a right in this circumstance any more than in any other.

Consequently, the fair reading of the Act is that Congress did not contemplate that unions and employers, by agreement, could jeopardize the right of individual employees to insulate their employment security from their union role or lack thereof. Any provision permitting such a diminution of employee protections which may lay hidden in the collective bargaining agreement here is therefore no defense to the § 8(a)(3) charge, just as union acquiescence in the discrimination against the employee-union leaders in *Mackay Radio* would not have been a defense to the § 8(a)(3) violation there.

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[12] "*Provided* that nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . .".

II. THE COLLECTIVE BARGAINING AGREEMENT HERE DOES NOT WAIVE THE § 8(a)(3) RIGHTS OF EMPLOYEE-UNION OFFICIALS.

Even if the Court should conclude, contrary to the arguments presented in Section IC, *supra*, that the § 8(a)(3) right not to suffer adverse employment consequences premised on union officer status may be waived, the Board's unfair labor practice finding here should be affirmed on the ground that there was no such waiver.

A. A waiver of statutory rights must be "explicitly stated" or be evidenced by a "compelling expression" of the parties' intent to effect the waiver. *Mastro Plastics*, *supra*, 350 U.S. at 283. Thus, for example, a broad, straightforward "no-strike" clause is insufficient to support a claim that "the employees' right to strike against unfair labor practices has been waived." *Id.* The claim that there has been a waiver must be supported by a "clear and unmistakable" showing that the party to a bargaining agreement who is said to have made the waiver has fully considered and consciously and intentionally yielded the otherwise applicable statutory right (*The Press Company, Inc.*, 121 NLRB 976, 978). The party's silence on the subject is not sufficient (*Timken Roller Bearing v. NLRB*, 325 F.2d 746, 751 (C.A. 6), *cert. denied*, 376 U.S. 971); nor is a general or ambiguous contract clause (*Texaco, Inc. v. NLRB*, 462 F.2d 812, 815 (C.A. 3)).[13]

In this case, the no-strike clause on its face states only that the union and its members may not engage in strikes. Nothing in the contract grants the employer the right to impose enhanced discipline on employee-union officials, im-

[13] *See also, e.g., C&P Telephone Co. v. NLRB*, —— F.2d ——, 111 LRRM 2165, 2168 (C.A. 2); *Prudential Insurance Co. v. NLRB*, 661 F.2d 398, 401 (C.A. 5); *NLRB v. Southern California Edison*, 646 F.2d 1352, 1364 (C.A. 9); *Communication Workers Local 1051*, *supra*, 644 F.2d at 927 (C.A. 1); *NLRB v. Wisconsin Aluminum Foundry Co.*, 440 F.2d 393, 399 (C.A. 7).

poses special obligations on employee-union officials or draws any distinction between the obligations under the no-strike clause of such employees and of other rank-and-file employees. Finally, there is not even a claim in this case that during collective bargaining the parties so much as addressed the question of permitting differential discipline of employee-union officials or of imposing special obligations on such employees, much less that the union consciously and knowingly stated that such discipline for engaging in a wildcat strike would be permissible. In sum, in this case, as in *Mastro Plastics*, there is no explicit statement or other compelling expression in the contract of an intent to waive a statutory right.

B. The Company maintains, however, that the waiver, which can nowhere be found in the agreement itself or in the conscious actions of the union, can nonetheless be provided by arbitrators' decisions.

In assessing that argument, it is essential, we believe, to keep in mind a basic distinction between the question answered by the arbitration awards relied on by the Company and the questions presented here. The arbitrators were asked to determine whether the collective bargaining agreement, standing alone, permits differential discipline of employee-union officials who take part in an unauthorized strike. That question is entirely independent from the questions posed in this case: whether § 8(a)(3) of the Act makes such discipline an unfair labor practice and whether the contract constitutes a waiver of § 8(a)(3) rights.

The arbitrator's charge in passing on employer discipline is to determine whether the employer's action is consistent with the *contract*, not to determine whether that action meets both the contract's norms and those of applicable or arguably applicable federal statutory law. The arbitrator's "task is to effectuate the intent of the parties rather than the requirements of enacted legislation.

Where the collective-bargaining agreement conflicts with Title VII [or other federal law] the arbitration must follow the agreement." *Alexander v. Gardner-Denver Co.*, *supra*, 415 U.S. at 56-57. Thus, the arbitrator's determination that employer action is "lawful" under the terms of the contract, is not perforce a determination that the employer's action is lawful under the NLRA. Indeed, even if the arbitrator does take the NLRA into account, "[s]hould the Board disagree with the arbiter . . . the Board's ruling would, of course take precedence . . . ." *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272.

Moreover, in making his determinations, the arbitrator is not required to find that the contract by its express terms permits the challenged employer actions. It is sufficient that the award "draws its essence from the collective bargaining agreement." *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597. In interpreting the contract, it was not necessary, for example, that the arbitrators, whose awards are cited by the Company, base their decisions on "clear and unmistakable" language in the contract permitting the Company to discipline the employee-union officials more severely than other rank-and-file employees for their conduct during an unauthorized strike. In contrast, only such language is sufficient to waive § 8(a)(3) rights. *See* Part IIA, *supra*.

It is plain that the arbitration awards on which the Company relies in this case do, indeed, deal solely with the first of the three questions we have noted—*viz.*, whether the collective bargaining agreement, standing alone, permits differential discipline of employee-union officials. The grievants in both arbitrations were such employees whom the Company had disciplined more harshly than other rank-and-file employees for participating in strikes in violation of the contractual no-strike clause. In the first case, employees staged a three-hour work stoppage to protest the Company's suspension of several employees. While the other employees who participated in

the work stoppage were given warnings, the three employee-union officials were given five-day suspensions. (These suspensions were later reduced to three days.) Pet. App. 54. The Company argued that the suspensions were warranted because the officials had failed to make "real efforts" to get the employees back to work. Pet. App. 55. Arbitrator Wayne E. Howard upheld the differential discipline, writing that:

> It is well-established that Union officials have an *affirmative duty* to protect the authority of the union leadership from illegitimate action on the part of employees, and to uphold the sanctity of the Agreement and its established grievance procedures. Failure to exercise this responsibility subjects them to more serious penalties.[5]

[5] *International Harvester Co.*, 14 LA 986; *Ford Motor Co.*, 41 LA 609; *Vickers Inc.*, 33 LA 594; *Borden Chemical Co.*, 34 LA 325; *Deere and Co.*, 43 LA 182; *Phillips Industries, Inc.*, 45 LA 953; *Acme Boot Co.*, 52 LA 1047; *Elgin Sweeper Co.*, 50 LA 1029; *American Hoist and Derrick Co.*, 53 LA 45.

[Pet. App. 60 and n.5 (emphasis in original).] [14]

The second arbitration decision relied upon by the Company concerned a dispute arising in December, 1975, when members of IBEW Local 603 refused to report for work for one hour because an outside contractor was performing work at the plant. Pet. App. 62, 63-64. Forty-seven employees who had participated in a previous work stoppage received one-day suspensions, fifteen first-offenders received written reprimands, and three employee-union officials received three-day suspensions. Pet. App. 62-63. The Company again sought to justify the more severe discipline of the officials by their breach of their "special obligations to honor and protect the collective bargaining agreement from being breached." Pet. App. 68. Arbitrator Jacob Seidenberg upheld the heightened discipline of one of the three employee-union officials,

[14] There are, we note, arbitration decisions to the contrary.

finding evidence in the record that his "conduct was passive and ineffective, and the Company could properly determine that he was guilty of failing to meet his responsibility . . . to secure compliance with a significant and meaningful contract provision." Pet. App. 71.[15]

In sanctioning the Company's imposition of harsher discipline, both arbitrators relied solely on a general notion that employee-union officials have an "affirmative duty" not to engage in wildcat activity, without specifying any source for that duty aside from other arbitration awards. Neither arbitrator suggested that the collective bargaining agreement in this case either expressly or implicity stated any such duty or granted the Company the attendant right to impose harsher discipline. Neither even referred to the contract's language. And neither arbitrator took any notice of the non-discrimination principle of § 8(a)(3), the decisions elaborating that principle beginning with *Mackay Radio*, *supra*, or the standard for determining whether there has been a waiver of a statutory right stated in *Mastro Plastics*, and its progeny. All that being so, the arbitration awards cannot, we submit, constitute evidence of a waiver by the Union of § 8(a)(3) rights.[16]

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[15] As to the others, the arbitrator found the evidence concerning their "dereliction of duty . . . inconclusive." *Id.*

[16] The Company also asserts that, although no waiver can be found in the "clear and unmistakable" terms of the parties' agreement, that void may be filled by the "clear and unmistakable" language of the arbitrators' decisions. Pet. Br. at 34-36. To support this contention, the Company relies on *Fournelle v. NLRB*, 670 F.2d 331 (C.A.D.C.), giving effect to an arbitrator's decision which, in the absence of express language in the parties' agreement, had itself "clearly and unmistakably" recognized the existence of special duties of employee-union officials. *Id.* at 343. That holding has since been limited by *Szewczuga v. NLRB*, —— F.2d ——, 110 LRRM 3289, 3290 (C.A.D.C.), in which that court required a finding that, through negotiations, the parties "explicitly created [such] higher duties."

In any event, the rule stated in *Fournelle* and advanced by the Company is simply incorrect. To allow the arbitrator's rulings,

C. In addition to arguing that the union's waiver can be found in or supplied by the arbitrator's decisions, the Company argues that, by renegotiating the collective bargaining agreement without specifically modifying or disapproving the decisions, the union, in essence, adopted them as binding. That argument, we submit, does not comport either with the terms of the contract or basic precepts of labor law.

1. It is well-settled (*see* Part II A *supra*) that a waiver of statutory rights occurs only when the employer prevails upon the union to cede such rights in the give and take of negotiations. Yet here the Company contends that the arbitration decisions should be viewed as having added to the agreement a waiver of the employee-union officials' § 8(a)(3) protections, which will survive unless and until the no-strike and discipline clauses are modified through negotiation. Pet. Br. at 32-33. This argument turns the concept of a waiver upside down: The arbitrator, through a decision which in effect strips the employee-union officials of their § 8(a)(3) rights, would hand the employer a concession never obtained through negotiations. The union, which had never consciously agreed to waive the right in the first place, would then be required, in order to recoup the windfall the arbitrator awarded to the employer, to secure that statutory right anew. Requiring the union to gain concessions from the employer in order to win back statutory rights which

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based on general notions of industry practice rather than the language of the agreement, to substitute for a waiver by the parties would totally eviscerate the requirement that the parties, through the give-and-take of negotiations, reach an accommodation on the issue. This would essentially make the arbitrator a party to the contract, with the power to determine the rights and obligations under it, even in the absence of a deliberate waiver by the party possessing a statutory right. However, the Act neither makes the arbitrator a party to the contract, vests him with the rights at issue in this case, nor empowers him to waive those rights on the union's behalf. Thus, the mere fact that the arbitration decisions in this

the union never intentionally relinquished, is a perversion of the "clear and unmistakable" waiver doctrine.[17]

2. Moreover, the contract in question clearly provides, on its face, that arbitrators' decisions are confined to the contract term during which they are decided. The arbitration clause in the Company's contract with the Union stated that "[a] decision [by an arbitrator] shall be binding . . . *for the term of this Agreement.*" (Emphasis supplied). The clause on its face demonstrates the parties' express intent that arbitration decisions are binding only for the term of the contract during which the awards were rendered. The parties are, of course, free to stipulate as to the precedential effect of arbitration award, F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 379 (1973), and such a contractual agreement should be given effect.[18]

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case may have clearly articulated duties owed by employee-union officials cannot eliminate the need for a waiver by the Union.

[17] *Cf. Timken Roller Bearing, supra,* where the Sixth Circuit rejected the employer's contention that the union's failure to secure a contract clause granting it access to wage information constituted a waiver of its § 8(a)(5) and 8(d) rights to the company's information. 325 F.2d at 750. The right, wrote the court, exists by virtue of the statute, and is not dependent on the bargaining agreement. *Id.* at 751. Similarly here, the Company's contention that a waiver should be found in the Union's failure to negotiate away the arbitrator's award makes the existence of the § 8(a)(3) rights dependent on the union's bargaining strength when, in fact, they exist by virtue of the statute.

[18] The Company argues that § 10(e) of the Act precluded the Union from raising the meaning of the arbitration clause before the Third Circuit. Pet. Br. at 31. Section 10(e), which provides for appellate review of Board orders, states that "[n]o objection that has not been urged before the Board . . . shall be considered by the court." 29 U.S.C. § 160(e). As the Union was in no way aggrieved by the decisions of the ALJ and the Board, we had no reason to object to them at any stage of this litigation and, in fact, we are not now objecting. The Union is, instead, presenting an alternative basis for upholding the Board's decision, and § 10(e) is therefore inapplicable. *Cf. NLRB v. Good Food Mfg and Processing*

3. The Company's argument that the parties' silence regarding the arbitration decision in renegotiating their agreement should be read as tacit approval is undercut not only by the plain terms of the collective bargaining agreement, but by general principles of contract interpretation. In *NLRB v. South Central Bell Telephone Co.*, No. 81-4159 (C.A. 5), the employer argued, as the Company does here, that in renegotiating a collective bargaining agreement, the parties had, by their silence, incorporated a previous arbitrator's decision imposing special responsibilities on employee-union officials for preventing unauthorized strikes. The court of appeals flatly rejected that argument, noting the pitfalls in drawing inferences from a document's silence on a subject:

> This is especially true with labor contracts since their formation is typically characterized by intense bargaining and the final contract usually represents hard-fought negotiations and compromises. Quite often, employers and unions exchange numerous quid pro quos, giving clauses and rights in direct exchange. This is particularly so in negotiations over no-strike clauses and grievance/arbitration procedures. *See American Manufacturing Co.*, 363 U.S. at 567, 80 S.Ct. at 1346. Because of this the Su-

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Corp., 492 F.2d 1302, 1305 (C.A. 7) (when ALJ's findings, favorable to petitioner, were subsequently reversed by the Board, and petitioner had no reason to file exceptions to the ALJ's decision in its favor, failure to do so is excused and § 10(e) does not preclude raising objections for first time before reviewing court.) *Accord, AMCAR Div. v. NLRB*, 596 F.2d 1344, 1350 n.8 (C.A. 8); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 801 (C.A. 7); *NLRB v. Teamsters Local 282*, 412 F.2d 334, 337 n.2 (C.A. 2), *cert. denied*, 396 U.S. 1038. In this case, the Union was satisfied with the results before both the ALJ and the Board. Moreover, in finding that the parties had defined the reach of arbitrators' decision, the Third Circuit relied on the plain language of the contract which the Company had placed in the record before the ALJ. Having introduced the bargaining agreement into the record, the Company should not now be heard to complain that the court's reliance upon the agreement is unfair to it.

preme Court has strongly cautioned courts against reading in changes or exceptions to such clauses. *See id.* They should be interpreted based on their plain and literal meaning so as to avoid interference with the private bargain.

Thus, in this case the principle that "labor contracts generally state affirmatively what conditions the parties agree to," *Torrington Co. v. Metal Products Workers Local 1645*, 362 F.2d 677, 681 (2d Cir. 1966), is particularly apt. Silence should not be and is not dispositive of the parties' intent in a labor contract. Giving the equivalent of stare decisis effect to prior arbitration decisions should be compelled by an express clause in the contract, *see Metropolitan Edison Co. v. NLRB*, 663 F.2d 478, 484 (3d Cir. 1981), *cert. granted*, —— U.S. ——, 102 S.Ct. 2926, 73 L.Ed.2d 1327 (1982); *Riverboat Casino, Inc. v. Local Joint Executive Board*, 578 F.2d 250, 251 (9th Cir. 1978), not read into a contract by a court far removed from the negotiations. [*South Central Bell, supra*, slip op. at 58.] [19]

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[19] We add that accepting the Company's contention that the arbitrators' decisions here survive until the Company agrees to negotiate away its gains would turn a nonmandatory subject of bargaining into a mandatory subject. This impermissible result, we submit, gives the Fifth Circuit's reasons added force. Imposing special responsibilities on employee-union officials, enforceable by employer discipline, allows the employer to intrude into the union's internal affairs. As we have noted, a union is free to choose and direct its own agents. How the union deals with its agents for a failure to carry out their official functions is entirely an internal union matter. The Company, however, seeks to make such a failure a matter that is not solely between the union and its officials, but one between the employee-union officials and the employer as well. The Company seeks the right to make its own determinations as to whether the employee-union officials have satisfactorily fulfilled the union's contractual obligations, and the power to discipline those employees if, in its view, they have failed to do so. Not only does this obviously and impermissibly permit employer interference in internal union affairs, but it destroys the Act's balance of bargaining powers, by allowing the employer to coerce union officials in their respec-

CONCLUSION

For the above stated reasons, the National Labor Relations Board's order in this case should be enforced.

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tive capacities, while leaving the union powerless to exert any sort of comparable influence on employer representatives. *See* Pet. App. 41-42. A contract clause granting the employer these extraordinary powers, if permissible at all, would clearly be a nonmandatory subject of bargaining. *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342, 350.

To allow an arbitrator's award creating such employer rights and employee-union official responsibilities to outlive the agreement during which it is rendered would turn this nonmandatory bargaining subject into a mandatory one. In order to modify or eliminate the effects of the award from the collective bargaining agreement, the union would be required, through collective bargaining, to secure the employers' acquiescence. Such a result is entirely inconsistent with the nation that "a party need not bargain and need not agree concerning nonmandatory issues." *NLRB v. Sheet Metal Workers*, 575 F.2d 394, 398-399 (C.A. 2).

Petitioner's Reply Brief

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

METROPOLITAN EDISON COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
and
LOCAL UNION 563, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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ARGUMENT

I. Respondents Have Repeated the Error of the Court Below by Analyzing the Contractual Issue Here in Terms of a Waiver of Statutory Rights.

It is noted preliminarily that Respondents fundamentally misapprehend the position of Petitioner, Metropolitan Edison Company ("Metropolitan Edison" or "the Company"),[1] regarding its right and authority to discipline union officials selectively for their participation in an unlawful strike.[2] The Board describes Petitioner as arguing that the prior awards of Arbitrators Howard and Seidenberg, together with the general no-strike clause, manifest a clear and unmistakable waiver by the Union[3] of the employees' statutory right not to have the severity of their discipline depend upon their decision to hold or not to hold union office. (Board Br. at 36). Local 563 contends similarly. (Local 563 Br. at 19-20). Respondents erroneously read into Metropolitan Edison's brief an acceptance of their position that there is at stake here some fundamental statutory right which, if it can be limited at all,[4] must be clearly and unmistakably waived. (Board Br. at 36; Local 563 Br. at 19-20). Respondents' intricate theory of this case, however, falls wide of the mark. The proper analysis, as consistently urged by Petitioner, is

1. Metropolitan Edison's listing of corporate affiliates is contained in footnote 1 of its principal brief.

2. In this reply brief, Petitioner will address Respondents' arguments concerning the contractual basis for attributing to union officials greater responsibilities than rank-and-file employees under a no-strike pledge. Petitioner will not repeat here its argument, or those of the *amici curiae* in support of reversal, that these special obligations are inherent in such positions as a matter of law. (*See* Pet. Br. at 39-45; Amicus Chamber of Commerce Br. at 15-20; Amicus Edison Electric Institute Br. at 15-21; Amicus Miller Brewing Company Br. at 3-11).

3. The Union here is the System Council which is comprised of five locals of the International Brotherhood of Electrical Workers, including Local 563, and is the bargaining representative for all of Metropolitan Edison's production employees. (Pet. Br. at 3-4).

4. The Board assumes that this vaguely defined statutory right can be waived by agreement of a union and employer. Local 563, on the other hand, argues that this right is personal to the individual employee and cannot be waived by his collective bargaining representative. In this, Local 563 is mistaken. *See* discussion at pages 4-5, *infra*.

that which is normally used in cases under Section 8(a)(3) of the National Labor Relations Act ("the Act").[5] *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Under that test there was no violation by Petitioner inasmuch as there was no discrimination, *viz.* no disparate treatment of similarly situated persons. (*See* Pet. Br. at 16, 20, 42-43).

The Court of Appeals for the District of Columbia Circuit in *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982), has punctured Respondents' waiver theory and their strained efforts to make an unfair labor practice case out of what is at its core a simple contractual matter.[6] Writing for the court, Judge Edwards said:

> [W]e hold that the Board was not free either to ignore the meaning of the contract or to substitute its own interpretation of the contract for the interpretation of the arbitrator. . . . Of course, the Court has recognized that the Board has a limited power to interpret the agreement when such interpretation is necessary to the exercise of its jurisdiction to remedy unfair labor practices. [Citing *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 428-30 (1967)]. But in the present case there was no such jurisdiction to exercise. We hold that the collective bargaining agreement, including the authoritative interpretation of the arbitrator, imposes special duties on union officials during unauthorized strikes and permits the employer's selective punishment of union officials who flout those duties. When the employer exercised his contractual right to discipline an offending union official, there was no unfair labor

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5. 29 U.S.C. §158(a)(3) (1976).

6. The *Fournelle* decision is especially important because its author, Judge Harry T. Edwards, is one of the nation's leading labor law authorities. In particular, he has authored a number of articles demonstrating that he is uniquely qualified to address the subject of the interplay between arbitration and federal administative agencies where the issue is discrimination on some statutorily proscribed basis. *See, e.g.*, Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 LAB. L.J. 265 (1976); Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599 (1971).

> practice. The Board's intervention in such a case was an impermissible attempt to decide *"a contractual claim that (did) not involve an unfair labor practice."* [Citation omitted].

Id. at 345 (footnote omitted) (emphasis added).

In analogous circumstances, the Court of Appeals for the Second Circuit in *United Aircraft Co. v. NLRB*, 440 F.2d 85 (2d Cir. 1971), rejected the argument that a Section 8(a)(3) issue concerning the application of a collectively bargained no-solicitation rule should be analyzed in terms of whether there had been a valid waiver of a statutory right: namely, "the employees' 'fundamental right' to be free from 'discriminatory treatment.' " 440 F.2d at 95. The court said: "We cannot accept [this characterization] of the issues, such as the presence of fundamental rights which must be clearly and unmistakably waived. Nor is the issue freedom from discrimination." *Id.* Instead, the court ruled that the case turned solely on whether the employer had properly applied the pertinent contractual clause. *Id.*

As recognized in *Fournelle* and *United Aircraft*, the issue here is not one of waiver of fundamental statutory rights. Rather, the proper inquiry arises under the collective bargaining agreement (i.e. to determine whether the union officials were similarly situated with other employees according to its terms), which is uniquely within the province of the labor arbitrator, rather than that of the Board. *See Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960); *NLRB v. C&C Plywood Corp.*, 385 U.S. at 426-28. Moreover, because of the clarity of the arbitration awards in this case, any notice requirement, as distinguished from a waiver requirement, whether it be deemed necessary to meet a clear and unmistakable test or some lesser standard, has been satisfied. *See Fournelle*, 670 F.2d at 343 n.21; *Consolidation Coal Co.*, 263 N.L.R.B. No. 188, slip op. at 20 (1982) (Member Zimmerman, concurring).[7]

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7. For a discussion of the abundant prior notice accorded the union officials in this case regarding their special duties and liability for added discipline, see pages 15-16, *infra*.

Thus, the Court is not faced with the determination and protection of an employee's statutory right to hold union office or to be free from discriminatory treatment by reason of his occupying such a position. Instead, this matter involves the simple enhancement through the collective bargaining process of the effectiveness of a no-strike promise by imposing obligations on union officers "to take affirmative steps to prevent or curtail unauthorized work stoppages," for breach of which employers may accord them special treatment or discipline. *Id.*, slip op. at 19-20 (Member Zimmerman, concurring).

II. Assuming Arguendo that Some Kind of Statutory Right Is at Issue, the Arbitral Awards Were Sufficient to Cede Such Right.

A. *The Statutory Rights Asserted by Respondents Are Waivable.*

Respondent Local 563 contends that the statutory right it alleges to be in issue — an employee-union official's Section 8(a)(3) right to have his employment security insulated from his union status (Local 563 Br. at 15) — is not waivable by a union in collective bargaining. As conceded by the Board (Board Br. at 32-33), however, each of the five courts of appeals which has reviewed Board decisions in this area has ruled, implicitly or explicitly, that whatever statutory right might be present is waivable through collective bargaining.[8] Moreover, the opinions of the members of the Board in its recent *Consolidation Coal* decision reveal clearly that a majority of the Board has abandoned the rule of *Precision Castings Co.*, 233 N.L.R.B. 183 (1977), and *Gould Corp.*, 237 N.L.R.B. 881 (1978), *enforcement denied*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980), and would find such rights to be subject to waiver.

Local 563's argument to the contrary is grounded on the idea that the two roles of an employee-union officer in no way overlap, and that as a union official he owes duties only to the union and its members and not at

8. *See* Pet. Br. at 18-20. The most recent court to do so, the Fifth Circuit, in a case upon which Respondents rely heavily (*see* Board Br. at 23, 33, 34, 35, 38, 42, 44; Local 563 Br. at 31-32), said: "Of course, such congressionally granted fundamental rights may be bargained away in a contract by a union." *NLRB v. South Central Bell Telephone Co.*, 688 F.2d 345, 355 (5th Cir. 1982).

all to the employer. It assumes further that the employee-union officer's on-the-job conduct in each respective role is entirely separate from his conduct in the other. This, of course, is palpably mistaken. Clearly, during an unlawful work stoppage the employee-union officer is at the same time fulfilling both of his roles.[9]

As recognized by Board Member Zimmerman, an employee's right to be free from disparate treatment on the basis of his status in the union "is no less amenable to waiver than the core right to strike, routinely waived in bargaining as the *quid pro quo* for inclusion of a grievance and arbitration clause in the collective bargaining agreement." *Consolidation Coal*, slip op. at 21 n.23 (Member Zimmerman, concurring).[10] And as the Court of Appeals for the Third Circuit has noted elsewhere, to the extent added obligations for enforcement of a no-strike pledge deter employees from holding union office, they should be deterred if they intend thereafter to participate in an illegal work stoppage. *Gould Inc. v. NLRB*, 612 F.2d 728, 733 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980).

B. *Arbitration Awards Are an Integral Part of Collective Bargaining Agreements and May Impose Upon Employee-Union Officials Enhanced Obligations During Unlawful Strikes.*

The determinative issue is the same under both Respondents' waiver theory and Petitioner's traditional Section 8(a)(3) analysis, *viz.* the effect of the prior arbitration awards. The critical inquiry for present purposes is whether there has been discrimination between

9. Even a commentator cited by the Board (Board Br. at 22 n.11) who posits Local 563's "separation of duties" theory, recognizes that additional obligations, nevertheless, may be imposed on union officials and that they can be made answerable to their employer for satisfying them. While Petitioner does not subscribe to this commentator's views generally, his position on this point is telling. Rummage, *Union Officers and Wildcat Strikes: Freedom From Discriminatory Discipline*, 4 INDUS. REL. L. J. 258, 285 (1981).

10. Indeed, the right to strike, one of the most fundamental of all rights under the Act, is deemed waived by implication simply by virtue of the existence of an agreement for a binding grievance and arbitration procedure. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

similarly situated persons. Respondents' position is that unions and employers may agree in the labor contract that employee-union officers have special responsibilities in the event of an unlawful strike. However, they do not accept an arbitrator's award as competent to furnish the necessary contractual predicate in the absence of explicit language in the agreement to which the union has affirmatively stated its assent. Under their very restrictive approach, nothing else would suffice.

Contrariwise, consistent with the *Steelworkers Trilogy*,[11] a clear, consistent, longstanding, unmodified arbitral construction of a labor agreement should be considered "part and parcel" of the contract. *See Warrior*, 363 U.S. at 578. Just as the Board and reviewing courts may not disregard the express language of the parties in the absence of an overriding contrary policy of federal labor law, *see NLRB v. Magnavox Co.*, 415 U.S. 322, 328-29 (1974) (Stewart, J., concurring in part and dissenting in part), they may not ignore arbitration awards to the same effect. This rule was recognized by the Court of Appeals for the District of Columbia Circuit in *Fournelle* and reiterated by it in *Szewczuga v. NLRB*, 686 F.2d 962 (D.C. Cir. 1982).[12]

As discussed herein, Respondents' basic misconception of the role of arbitration in the collective bargaining process infects and fatally undermines the basic premises of their argument. This is epitomized by Local 563's glaring misreading of *Szewczuga*, in characterizing it as having "limited" *Fournelle* and requiring "a finding that, *through negotiations*, the parties 'explicitly created (such) higher duties.' " (Local 563 Br. at 28 n.16) (emphasis added). The passage of *Szewczuga* paraphrased by Local 563, however, refers not to "negotiations," but to "*the collective bargaining process*." 686

11. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

12. In *Szewczuga*, the District of Columbia Circuit stated clearly that in *Fournelle* it had rejected the Third Circuit's holding in the case *sub judice* that past arbitral awards are not part of the collective bargaining agreement absent a clause explicitly providing that they will be precedentially binding. 686 F.2d at 973 n.81. The result in *Szewczuga* is not apposite to our situation, however, because the arbitration award in that case was not introduced into evidence, or relied upon by the employer. *Id.* at 970-72.

F.2d at 969 (emphasis added). That term is described in *Szewczuga* as being used there "in the sense that the *Fournelle* court gave it, to include certain arbitral results as well as the terms of the collective agreement reduced to writing." *Id.* at 973 n.84.

In its discussion of *Fournelle* and *Szewczuga*, Local 563 protests that to allow arbitral constructions of a collective bargaining agreement to fill gaps in the contract in the current context "would essentially make the arbitrator a party to the contract, with the power to determine the rights and obligations under it, even in the absence of a deliberate waiver by the party possessing a statutory right." (Local 563 Br. at 28-29 n.16). This result, which is so alarming to Local 563 (and, presumably, to the Board), is precisely what this Court, in the *Steelworkers Trilogy*, effectively held the role of a labor arbitrator to be.[13]

III. The Decision of the Court of Appeals for the Fifth Circuit in NLRB v. South Central Bell Telephone Co. Is Erroneous and Reflects the Infirmities of Respondents' Position.

Since the filing of Petitioner's principal brief, the Court of Appeals for the Fifth Circuit has joined the Court of Appeals for the Third Circuit in refusing to recognize an arbitral construction of a labor agreement as furnishing a contractual authorization for holding employee-union officials to higher standards than ordinary employees when an illegal strike occurs. *NLRB v. South Central Bell Telephone Co.*, 688 F.2d 345 (5th Cir. 1982). Those two circuits, thus, are squarely in conflict with the District of Columbia Circuit.[14]

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13. In its principal brief, Petitioner fully explained the controlling effect of the *Trilogy*'s lessons in this case. (Pet. Br. at 22-29).

14. In *South Central Bell*, the Fifth Circuit vainly attempted to distinguish *Fournelle* on the basis of the no-strike clause in that case being much broader than the one before it, 688 F.2d at 356 n.11, a dubious contention, but, in any event, clearly not pivotal to the court's holding or analysis. The court also read *Fournelle* as specifically excluding cases such as *South Central Bell*, apparently overlooking the second part of the *Fournelle* disclaimer that it was not deciding whether selective discipline of a union official is proper where the labor agreement contains only a general no-strike clause "*and* there is no clear arbitration decision construing the contract to allow for selective discipline." *Fournelle*, 670 F.2d at 338 (emphasis added).

In *South Central Bell*, the Fifth Circuit rejected the applicability of the *Steelworkers Trilogy* in part on the basis that the Board, in exercising its unfair labor practice jurisdiction, need not feel itself constrained by an arbitrator's decision under the parties' collective bargaining agreement. The court relied on *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436-37 (1967), to support its conclusion on that point. *South Central Bell*, 688 F.2d at 349. The issue in *Acme*, however, was whether the Board should yield to an arbitrator its jurisdiction over the unfair labor practice question involved in an employer's refusal to furnish certain grievance information to a union. The circumstances of our case are fundamentally different.

Here, the issue is not one of mandatory deferral of the Board's jurisdiction to a labor arbitrator for the vindication of what is clearly a statutory right, as in *Acme*. Rather, the issue in the present case involves the direct interpretation or construction of the labor agreement. The critical question involves the field of the labor arbitrator's expertise — interpretation and application of a labor agreement, rather than that of the Board — interpretation and application of the Act. Significantly, in *Acme* the Court observed that "*the Board was not making a binding construction of the labor contract.* It was only acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. This discovery-type standard *decided nothing about the merits of the union's contractual claims.*" *Id.* at 437 (footnote omitted) (emphasis added).[15]

Moreover, in *NLRB v. Strong*, 393 U.S. 357 (1969), the other precedent on which the Fifth Circuit relied in dismissing the *Trilogy*, this Court observed that "*[a]rbitrators and courts are still the principal sources of con-*

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15. In *Acme*, 385 U.S. at 436, the Court cited *Carey v. Westinghouse Electric Corp.* 375 U.S. 261, 269-72 (1964), which stated that in the event of a conflict between the arbitrator and the Board regarding a *bargaining unit issue*, the Board would "take precedence." Petitioner does not challenge the Board's supremacy over arbitration in such matters or in true unfair labor practice cases, as distinguished from "a contractual claim that (did) not involve an unfair labor practice." *Fournelle*, 670 F.2d at 345 (citation omitted).

tract interpretation," even though the Board may proscribe conduct which is an unfair labor practice and which is also a breach of contract remediable through arbitration. *Id.* at 360-61 (emphasis added).

In *Strong*, the Court cited *C&C Plywood* for the proposition that the Board has authority to interpret labor agreements in the course of resolving unfair labor practice claims. *Id.* at 361. In *C&C Plywood* this Court recognized, however, that the Board's right to interpret collective bargaining agreements is not plenary, but is on an as "necessary" basis. 385 U.S. at 428. In so doing, the Court stressed that, in the circumstances before it, there was no arbitration clause, *id.* at 426 n.9 and accompanying text, and that there had not yet been an authoritative construction of the agreement, *id.* at 429.

By clear contrast, there is here not only a binding arbitration procedure, but also an authoritative construction of the contract by two separate arbitrators on the point which is determinative of the case. *See id.* In such circumstances, the policy of industrial stability which underlies the *Trilogy* precludes the Board from disregarding that reading of the agreement and substituting its own. *See Fournelle*, 670 F.2d at 344-45. Thus, *South Central Bell* incorrectly deemed it to be within the Board's purview to ignore an arbitral award in circumstances similar to those of the instant case.

In addition to relying on *Acme* and *Strong*, the Fifth Circuit based its conclusion on two major premises which are echoed in Respondents' arguments to this Court. First, it relied on Section 10(a) of the Act, 29 U.S.C. §160(a), and the Board's *Spielberg*[16] deferral test which it found was not satisfied. 688 F.2d at 349-52. Second, it ruled that no ratification or adoption of an arbitral award could be attributed to a union based alone on the silence of the parties in subsequent contract negotiations. *Id.* at 352-53.

A. *Section 10(a) and the* Spielberg *Doctrine Are Inapposite Here.*

The Fifth Circuit argued initially that the *Trilogy* was inapplicable because the case involved its review of

16. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

a Board decision not to enforce "*directly*" an arbitral decision, rather than a request of the court to do so (under Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §185 (1976)). It determined, therefore, that Section 10(a) and the Board's *Spielberg* deferral standards applied. 688 F.2d at 349.

The Board, following the Fifth Circuit, misapplies Section 10(a) in the circumstances of our case. Section 10(a) provides in pertinent part that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." The application of this section, however, must be reconciled with the fundamental policy embodied in Section 203(d) of the LMRA, 29 U.S.C. §173(d) (1976), that private resolution of disputes involving the application or interpretation of labor agreements is to be the desired method. *American Manufacturing Co.*, 363 U.S. at 566.

Within the context of the present case, reconciling these two policies requires that the reach of Section 10(a) be limited to *particular controversies before the Board*. Thus, if the first arbitration award between the parties had issued in connection with the 1977 discipline of union officers Lang and Light which is at issue here, Section 10(a) would preserve for the Board its jurisdiction independently to determine any unfair labor practice issues. Here, however, the arbitration awards issued years before the claimed unfair labor practice and in different cases. Hence, they are not presented to the Board as a resolution of the unfair labor practice charge before it, but as a part and parcel of the collective bargaining agreement which must be considered by the Board in making its statutory determination.

Application of *Spielberg* in these circumstances is similarly inappropriate. Contrary to the assertion of the Fifth Circuit that it was presented with a Board refusal to enforce *directly* an arbitration award, *South Central Bell*, 688 F.2d at 349, the situation facing it would have involved the Board's *collateral* consideration of a prior arbitral construction of the collective bargaining agree-

ment.[17] The Board there, as here, was not being asked to defer to an arbitral resolution of the unfair labor practice case then before it, but simply to recognize as a part of the labor agreement the prior pertinent arbitral construction.

Focusing on the *Spielberg* repugnancy-to-the-Act criterion, even if the arbitration awards here were deemed subject to evaluation under that doctrine, they would pass muster and deferral would be warranted. At the time they issued,[18] in 1973 and 1975 respectively, the Howard and Seidenberg decisions were clearly consistent with existing Board law. (*See* Pet. Br. at 39-42) Even accepting the Board's argument that its pre-*Precision Castings* cases were not as clearly consistent as Petitioner contends (Board Br. at 21-22 n.11), such inconsistency itself precludes a determination that the arbitrators' rulings were "clearly repugnant" to the Act.

Respondents apparently would assess the "repugnancy" of the Howard and Seidenberg awards and their alleged failure to grapple with the supposed statutory issue in accordance with the *most current* decisions under the Act, *i.e.* the newly developed waiver theory. The mischief that would result merely serves to

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17. It should be noted that the Board did not in *South Central Bell* or in the instant case make a *Spielberg* analysis regarding the arbitration awards. It simply applied its now discredited *per se Precision Castings* rule under which no arbitral award nor, indeed, any specific agreement of the parties, could make lawful the selective discipline of union officials for merely participating in an unlawful strike, as opposed to instigating it or actually leading it. The Fifth Circuit stated incorrectly that the Board declined to defer to the prior arbitration award because it was repugnant to the Act. 688 F.2d at 350. In fact, the Board said only that there was "no reason to give deference" to the award. It said nothing about the decision being repugnant to the Act, nor did it mention or cite *Spielberg*. *South Central Bell Telephone Co.*, 254 N.L.R.B. 315, 317 n.4 (1981). As noted, having invoked its *per se* rule, the Board had no occasion even to consider whether *Spielberg* should apply.

18. *C.f. Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 458 (3d Cir. 1981) ("An examination of the collective bargaining agreement, 'read as a whole and in light of the law relating to it *when made*,' *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956), establishes such a clear and unmistakable waiver.") (emphasis added).

highlight the inapplicability of *Spielberg* to challenge collaterally a prior arbitral contract construction. Here, both Metropolitan Edison and the Union obviously accepted the arbitration awards as binding upon them for more than four years.[19] Metropolitan Edison relied on them in holding union officials to the higher standards of conduct recognized therein and disciplining such employees selectively for failing to meet those special obligations. The Union made no effort in two subsequent negotiations to eliminate those responsibilities and passed up opportunities, including the greater discipline of Lang and Light (the officers involved here) in October, 1973, to challenge them until after the dramatic change in Board law in 1977.

Under Respondents' theory, such a bargaining history counts for naught. For if, after any number of years, the Board, as here, suddenly changes its interpretation of the Act so that a previously harmonious contract construction becomes inconsistent with the Act, it could then apply its *Spielberg* doctrine and disregard that longstanding interpretation which had been well-accepted by the parties. Nothing could be more flagrantly inconsistent with the most basic goal of national labor policy of fostering industrial stability through collective bargaining and arbitration. It would fatally undermine in one mindless stroke the place of arbitrators in that scheme as the interpreters of collective bargaining agreements and the oracles of industrial common law, and, as such, the guardians of peace in the workplace.

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19. The Union did not challenge before the Board the arbitral construction of the contract until the Board radically altered its reading of the Act in November, 1977, when it issued *Precision Castings*. The Union previously had ideal opportunities to do so in October, 1973, and December , 1974, (*see* Pet. Br. at 5-6), but declined. Moreover, the discipline involved here was meted out in early September, 1977. Notably, the Union did not file its unfair labor practice charge until January 9, 1978 (Joint Appendix at 1), four months later and two months after *Precision Castings*. The Union's inaction until then is a strong indication that it shared Petitioner's reading of the prior Board law.

B. *Acquiescence by Parties to Arbitral Constructions of Their Labor Agreement Reinforces Those Constructions as Part and Parcel of Their Contract.*

Again, as the Fifth Circuit did in *South Central Bell*, Respondents argue that there is no waiver or ceding of rights here based on the arbitration awards because there has been no explicit adoption of them by the Union. 688 F.2d at 352-53. (Board Br. at 41-42; Local 563 Br. at 31-32). They argue that the parties' silence regarding the issue in subsequent contract negotiations, particularly the Union's, cannot be viewed as a substitute for explicit acceptance of the arbitral construction.

On this point Respondents are fundamentally mistaken. They err initially in thinking that an arbitral interpretation does not become part of an agreement unless specifically incorporated. As is clear from the *Trilogy*, unless otherwise agreed, arbitral interpretations and applications of a labor contract become part of it. (*See* Pet. Br. at 24-29). There is no need specifically to so provide.[20]

Their notion that the arbitral construction cannot be adopted by silence is similarly off base. This is not a situation where one party makes a proposal and the other is alleged to have acceded to it by failing to reject it. Rather, the situation is precisely like that addressed by this Court in *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212 (1979). The Board has attempted to distinguish that case on its facts. (Board Br. at 41 n.23). However, the statement by the Court in *Carbon Fuel* regarding the effect of an authoritative contract construction which remains unmodified by the parties as being thereby

20. Respondents argue that accepting the arbitral construction as part of the agreement turns the waiver concept "on its head" by requiring the Union to disaffirm or disclaim a waiver. (Board Br. at 41; Local 563 Br. at 29-30). But the situation would not be fundamentally different had there been a contract clause to the same effect as the arbitration awards. In that event, the Union would have to negotiate a change or disclaimer of its waiver. Given the role of the labor arbitrator under the *Trilogy* as the parties' surrogate who is charged with filling the interstices of their contract, there is nothing startling about equating his award with an agreement by the parties themselves.

adopted by them, *id.* at 222, is fully applicable here. It matters not what underlies that construction — it is the fact of the construction which is significant. Together with all of the other indicia of Union acquiescence to the arbitral construction here, the fact that it remained unmodified in the parties' intervening negotiations clearly and unmistakably evidenced the Union's waiver, if such is necessary, of any possible underlying statutory rights.[21]

C. *There Is Clear and Unmistakable Evidence That the Union Here Waived Whatever Statutory Right Might Be at Issue and That There Was Abundant Notice to the Union Officials of Their Special Obligations.*

As did the Fifth Circuit in *South Central Bell*, Respondents have taken the position that the contractual basis necessary in order to discipline union officers selectively for an unlawful strike can only take the form of clear and unmistakable language in the labor agreement itself which details with precision the special responsibilities of such employees in those situations. 688 F.2d at 355, 356. (Board Br. at 35-36 n.18 and accompanying text; Local 563 Br. at 24-25, 26). Assuming for purposes of discussion only that a waiver analysis is proper, which Petitioner does not accept as correct (*see* discussion at pages 1-4, *supra*), this position too narrowly confines the circumstances under which a waiver of statutory rights can be effected.

The Board has held on a number of occasions that such waivers can occur through the *conduct* of the parties, apart from the language of their collective bargaining agreement. The test is clear and unmistakable *evidence* of a waiver, rather than clear and unmistakable

21. In an attempt to divorce itself from its General Counsel, the Board dismisses as irrelevant his stipulation that the sympathy strike here was unlawful under the parties' broad no-strike clause. At a minimum, however, if, as the Board suggests (Board Br. at 45 n.25), General Counsel so stipulated because Local 563 did not press the matter in its charge, the inaction of Local 563 becomes further evidence of its general acceptance of arbitral constructions as constituting a binding part of its labor agreement. (*See* Pet. Br. at 45).

language embodying a waiver. For example, in *Pacemaker Yacht Co.*, 253 N.L.R.B. 828 (1980), *enforcement denied*, 663 F.2d 455 (3d Cir. 1981), the Board said: "The intent to effect a waiver of the right to strike may be found in the express language of the no-strike provision, or by examining the bargaining history of the provision, or any other relevant conduct of the parties. In the absence of explicit waiver language in the contract, the Board requires probative extrinsic evidence that the parties intended a waiver." *Id.* at 829. *See General Motors Corp., Delco Moraine Division*, 257 N.L.R.B. 1068 n.2 (1981); *St. Regis Paper Co.*, 253 N.L.R.B. 1224, 1227 (1981) (ALJ Opinion adopted by Board); *Operating Engineers, Local Union 18 [Davis-McKee, Inc.]*, 238 N.L.R.B. 652 (1978).

The record in this case demonstrates a clear and unmistakable waiver on the Union's part, and that the Union and the Company had a "meeting of minds," *South Central Bell*, 688 F.2d at 353. It further evidences that the employee-union officers involved, Lang and Light, had more than sufficient notice of their special responsibilities and of their liability for increased discipline should they fail to satisfy those obligations in the event of an unlawful strike. Adequate notice, after all, is really what seems to be the proper concern of the Board and the courts of appeals. *See Fournelle*, 670 F.2d at 343 n.21; *Consolidation Coal*, slip op. at 20 (Member Zimmerman, concurring). (Board Br. at 35-36 and n.18).

First, there were unlawful strikes in 1970, 1972, 1973 and 1974. On each occasion the union officials who participated suffered more serious penalties than the other employees. Second, the 1972 strike resulted in two arbitration decisions: in February, 1973, Arbitrator Alderfer ruled that a sympathy strike is barred by the broad no-strike clause; in May, 1973, Arbitrator Howard ruled that union officers have specifically defined additional responsibilities in such circumstances and that, accordingly, they can be more severely disciplined under the contract. Third, in October, 1973, Lang and Light were selectively disciplined for participating in an illegal strike for which rank-and-file employees were disciplined less severely; Local 563's Executive Board, of

which Lang and Light were members, affirmatively decided to grieve two cases involving lesser discipline which the Executive Board "liked" (Joint Appendix at 92), but not to grieve on their behalf, obviously because it did not think they could prevail in light of the Howard award.[22] Fourth, in May, 1974, the parties negotiated a renewed collective bargaining agreement with no material change in it and did not otherwise negate the Howard construction of the contract. Fifth, in December, 1974, another illegal strike occurred, resulting in added punishment for the union officials involved. The Union challenged the discipline in arbitration before Arbitrator Seidenberg who adopted the same position as Arbitrator Howard. Sixth, the contract was again renewed in May, 1976, without any modification of the Howard and Seidenberg interpretations. Seventh, on August 4, 1977, Lang and Light took part in a breach-of-contract strike for which they and most of the other participants were not disciplined because of peculiarly confusing circumstances. On at least four occasions during the days following that episode, however, the Company reminded Lang and Light of their special duties and their risk of additional punishment. Obviously recognizing his obligations in that regard, Lang attempted to persuade the other employees to honor the no-strike pledge in the future. Finally, during the work stoppage on August 30, 1977, Lang and Light were specifically reminded by Company representatives that they personally were in serious trouble if they did not satisfy their special obligation to honor the no-strike pledge and report to work.

Clearly, prior to August 30, 1977, Lang and Light were on notice as to their responsibilities and their liability for greater sanctions if they failed to meet them. Just as clearly, the Union had acquiesced to the Howard construction of the collective bargaining agreement until the Board changed its reading of the Act in *Precision Castings*. Significantly, when the Union challenged the selective discipline of its officials in 1974 before Arbitra-

22. Significantly, the disciplinary notices issued to Lang and Light in 1973 specifically enumerated the special responsibilities which Arbitrator Howard explained in his award. (Joint Appendix at 14, 15).

tor Seidenberg, it accepted the fact that they had special responsibilities, arguing only that those duties had been met. (Appendix to Cert. Petition at 68-70).

Finally, the Board questions the sufficiency of the Howard and Seidenberg awards as furnishing a certain-enough basis for finding that a statutory right was waived. It argues that a future arbitrator would not be bound absolutely by the current construction. The Board points to the statement in Article IX, §9.2, 4th of the labor agreement that an arbitral decision "shall be binding . . . for the term of this agreement" (Resp. Exh. No. 1 at 45), as relieving an arbitrator under a subsequent term of the agreement of any necessity to follow awards under earlier agreements. (Board Br. at 42). Local 563 goes further and argues that this sentence limits the effect of an arbitration award to the term of the contract during which it was rendered. (Local 563 Br. at 30).

Petitioner addressed this argument at length in its principal brief and has shown that these are not words of limitation. (Pet. Br. at 31-33). They are little more than surplusage, and certainly do not support the negative inference for which the Union argues. If such an inference were drawn, the parties would be required to reorder crucial elements of their collective bargaining compact which they previously thought had been settled by arbitration decisions they have left unchanged.

That such an inference is unwarranted may be seen further by comparing Article I, §1.5 of the agreement which states: "*During the period of this agreement*, the Company will not meet nor treat with any other labor organization with respect to the employees found in the bargaining unit hereby established and confirmed." (Resp. Exh. No. 1 at 11) (emphasis added). If the Union's interpretation of Article IX, §9.2, 4th is correct, then the analogous language in Article, I, §1.5 would relieve Metropolitan Edison of the obligation to deal exclusively with the Union after the agreement expires. That would no doubt surprise the Union.

As an example of the sort of clause parties use if they intend affirmatively to impose restrictions on the binding effect of arbitration awards, see the language of limitation to which the Fifth Circuit referred in *South Central Bell* where it was clear that an arbitrator's deci-

sion applied "only"[23] to the individual grievance and did not serve as a "precedent" unless "adopted by the written concurrence" of the parties. 688 F.2d at 353.

The Board argues further that there is no specific contractual language on which Arbitrators Howard and Seidenberg relied. (Board Br. at 40, 42). It also questions the arbitral authority on which Howard based his reading of the agreement. (Board Br. at 38-40). Neither of these points, however, even if valid, changes the fact that the Howard award itself clearly and unambiguously states the special obligations to which union officers are subject in the event of a breach-of-contract strike. How that decision was reached and whether it can be modified is irrelevant, so long as it meets the test of *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 598 — that it draw its essence from the contract. That, it clearly does.[24] Therefore, as of May 30, 1973, more than four years prior to the incident here, the Howard decision became, and, because it was never changed by the parties, remained, "part and parcel" of the collective bargaining agreement.

IV. Nullification of the Arbitral Awards Deprives Petitioner of the Benefit of Its Bargain.

We return to the basic point that what is at issue here are not rights of individual employees under Sec-

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23. To the extent that Local 563 makes a confusing reference to what the clause in question here "on its face demonstrates" (Local 563 Br. at 30), it should be emphasized that the provision nowhere refers to arbitral decisions being binding "only" for the term of the agreement.

24. *See, e.g.*, Article XI, § 11.1 and Article XII, § 12.2 of the contract. (Resp. Exh. No. 1 at 46, 47). Also see the Union's recognition of the need for the Company, as a public utility, to maintain continuous service as acknowledged in Article II, § 2.7; Article V, §5.4(a); and Article VI, § 6.3(a). (Resp. Exh. No. 1 at 13, 24, 32). It is not necessary for an arbitrator to "undertake a chapter-and-verse exegesis of the contractual document in rendering his decision," in order for it to be approved and enforced under the *Trilogy*. *Fournelle* 670 F.2d at 342 n.20. For this purpose, Petitioner assumes, but does not concede, that a collateral review of the arbitration awards under the *Trilogy* standard is permissible.

tion 8(a)(3) or under Section 7 of the Act, 29 U.S.C. §157 (1976), but, rather, the ability of employers and unions to provide for peace between them through binding grievance-arbitration procedures and concomitant pledges not to strike. The imposition of special obligations on employee-union officials, toward the end that the no-strike promise is more likely to be honored and the employer more likely to realize the full measure of the most important aspect of his bargain, is simply an extension and refinement of the union's undertaking. As Justice Powell demonstrated in his concurring opinion in *Complete Auto Transit v. Reis*, 451 U.S. 401 (1981), employers have precious few, if any, effective means to enforce that promise, the remedies available being, in his words, "largely chimerical" and "illusory," *id.* at 417, 420 (Powell, J., concurring).

By assuming that, had it applied the proper test, the Board would have nullified the arbitral construction of the parties' agreement here, which they obviously had relied upon as binding, and by holding that such nullification would have been proper, the Court of Appeals for the Third Circuit not only disregarded the teachings of the *Steelworkers Trilogy*, it deprived Metropolitan Edison of the benefit of its bargain and gave the Union a windfall. For it may be fairly assumed that against the backdrop of the unchallenged and unmodified Howard and Seidenberg awards, the Company either granted concessions or decided not to press certain demands in bargaining. One way or another, the Company purchased the fruits it expected to receive from the arbitrators' construction of the contract. *See NLRB v. Magnavox Co.*, 415 U.S. at 328 (Stewart, J., concurring in part and dissenting in part). Nullification of that bargain by the Board or courts is contrary to the fundamental purpose of the Act to promote industrial peace through a system of free collective bargaining, *id.*, of which arbitration is an integral part.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Petitioner's principal brief, Petitioner, Metropolitan Edison Company, respectfully requests this Court to reverse the judgment of the Court of Appeals for the Third Circuit and to direct that the Court of Appeals remand the case to the National Labor Relations Board with instructions to dismiss with prejudice the Complaint against Metropolitan Edison.

Respectfully submitted,

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Amicus Brief

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IN THE

Supreme Court of the United States

October Term, 1981

METROPOLITAN EDISON COMPANY,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") submits this brief *amicus curiae* in support of the Petitioner in this case, by consent of all parties. The Chamber is a federation consisting of over 2700 state and local chambers of commerce and trade and professional associations, and has a direct business membership representing more than 250,000 business activities.

The Chamber regularly represents its member-employers in important labor relations matters vitally affecting their interests, before the Courts, the Congress, the Executive, and the independent regulatory agencies of the federal government. This representation includes providing legal assistance and support to an affected member when its case will have a broad impact on the Chamber's membership as a whole. Accordingly, the Chamber has sought to advance its members' interests in a wide spectrum of labor relations litigation.

This case presents issues of vital importance to the Chamber's members, many of which employ unionized labor and have collective bargaining agreements containing grievance/arbitration provisions and no-strike clauses. The National Labor Relations Board's decision overturns well-established principles of the responsibilities of union officials to uphold the grievance/arbitration system and thus undermines one of the central goals of national labor policy. The effect on the Chamber's members is particularly aggravated when the Board eviscerates one of the only measures available to employers to enforce the promises of individual union members not to strike during the contract term.

The broad membership perspective presented by the Chamber places it in a unique position to bring to the

Court's attention considerations relating to the sweeping and destructive impact of the Board's decision, which otherwise might not be advanced by the parties to this litigation. Accordingly, the Chamber has sought to represent these interests before this Court.

STATEMENT OF THE CASE

Petitioner Metropolitan Edison Company is a public utility providing electricity to 300,000 customers located throughout southeastern Pennsylvania. The dispute from which this case arises occurred at Metropolitan Edison's Three Mile Island generating plant near Harrisburg, Pennsylvania on August 30, 1977. At the time of the incident giving rise to this controversy, the Company had approximately 516 employees working on the island. Three hundred of those employees were represented by the Respondent Union (the "Union") and were covered by a collective bargaining agreement; the other employees were not.

The collective bargaining agreement in effect on August 30, 1977 between Metropolitan Edison and the Union contained the following language:

> "Article XI. No Strikes—No Lockouts.
>
> 11.1 The Brotherhood, and its members, agree that during the term of this Agreement there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public."

On August 30, 1977, a picket line composed of members of another union formed at the entrance to Three Mile Island. As a result, members of the Respondent Union, including Local union President Lang and Vice-President Light, refused to report to their work assignments, engaging in a work stoppage in violation of the collective bargaining agreement. *The parties to this proceeding stipulated that this incident constituted a strike in violation of the collective bargaining agreement,* and

both Lang and Light acknowledged their participation in the strike.

After refusing to cross the picket line, the employees congregated in a large group at the union hall (approximately three miles from the island), and remained away from the worksite until the picket line was removed. When Metropolitan Edison learned of the picket line and the existence of a stoppage, its personnel administrator immediately called President Lang at Lang's home to report the situation. Lang drove to the picket line and engaged its members in conversation. As the personnel administrator and Lang spoke with the pickets, an employee represented by the Union drove up in his car and asked what to do. The personnel administrator told the employee to go to work, but Lang told him to go to the union hall. The employee thereupon turned his car around and drove off, failing to cross the picket line or report to work. Lang thereupon made it clear to the personnel administrator that the employees had voted previously not to cross picket lines, and would not cross this one.

Shortly thereafter, another supervisor advised both Lang and Vice-President Light of the gravity of the matter; both Lang and Light replied that they and the members of the Union would not go to work until the pickets were removed. On other occasions, Company personnel advised both Lang and Light of their personal responsibility to go to work, and urged that the employees would follow their examples. Still, Lang and Light refused to work.

Ultimately, the other union removed its picket line, and the employees of Respondent Union, including Lang and Light, returned to work. Metropolitan Edison disciplined all of the employees who had refused to report to work. One hundred twenty-one first-time offenders

were given five-day suspensions. Fourteen offenders who had engaged in such conduct previously were given ten day suspensions. Lang and Light, the two union officials, received twenty-five day suspensions. Metropolitan Edison imposed the more severe discipline on Lang and Light because of their particular responsibility as union officials to uphold the collective bargaining agreement, and because they had participated in the stoppage and had refused to make any effort to prevent or end it. The National Labor Relations Board (the "Board") held it a violation of §§ 8(a)(1) and 8(a)(3) of the Labor Management Relations Act, 29 U. S. C. § 141 *et seq.*, to impose selectively such harsher discipline upon union officials.

Six times in the seven years prior to this incident, employees of the Union at various facilities covered by the labor agreement with Metropolitan Edison had engaged in stoppages that violated the no-strike clause. On every occasion, Metropolitan Edison disciplined more harshly any union officials who participated. Moreover, on two previous occasions—in 1972 and in 1974—the Union had filed grievances contesting harsher discipline for union officers, and the discipline had been ruled appropriate under the collective bargaining agreement by an impartial arbitrator.

The 1972 decision of arbitrator Howard could not have been clearer on this point, as he followed the long-established rule of labor arbitration decisions:

> Participation in a unauthorized strike or work stoppage is one of the most serious offenses with which an employee can be charged.
>
> . . .
>
> Because of the seriousness of the offense, the obvious economic problems in punishing all who participate,

> and the great difficulty in securing accurate information as to the extent of employee involvement, it is well established in arbitration that the Company may assess selective discipline upon those who have a greater degree of involvement, or upon those against whom it can get reliable evidence, notwithstanding the participation of others who escape discovery. It is equally well established that because of the seriousness of the offense and the difficulty of securing reliable information, arbitrators have allowed management to develop rather broad criteria for selective discipline.
>
> . . .
>
> The three grievants stood in a position different from other employees . . . . It is well established that Union officials have an *affirmative duty* to protect the authority of Union leadership from illegitimate action on the part of employees, and to uphold the sanctity of the agreement and its established grievance procedures. Failure to exercise this responsibility subjects them to more serious penalties.

In 1974, the union again took to arbitration the issue of additional discipline for union officials. The arbitrator again upheld harsher discipline of the individual who "was guilty of failing to meet his responsibility as a senior shop steward to secure compliance with a significant and meaningful contract provision." Finally, it is worth noting that during the weeks prior to the August 30, 1977 incident, as a result of a brief work stoppage on the morning of August 4, the Company made a special point to advise Light and Lang emphatically that the Company expected bargaining unit employees to make efforts to cross any future picket lines by outsiders.

Notwithstanding long experience with a no-strike clause repeatedly interpreted to permit harsher discipline for union officials who violate it, notwithstanding specific directions from management to return to work, and despite the plain effect their participation had in leading the rank and file to continue the stoppage, union officers Lang and Light refused to work on August 30, 1977. Consistent with its prior practice and with arbitrators' repeated interpretations of the contract, Metropolitan Edison disciplined the officers more harshly for those actions. The Board and the Court of Appeals held that this discipline violated the Labor Management Relations Act. Metropolitan Edison petitioned this Court for a writ of certiorari, and this Court granted the petition on June 4, 1982.

SUMMARY OF ARGUMENT

Both the terms and the history of national labor legislation require that an employer be free to discipline or discharge any or all employees who strike in violation of their collective bargaining promises, as the employer elects. In adopting a rule that permits union officials to ignore their responsibilities with impunity, the Board has abandoned both logic and decades of the common law of industrial relations. The new rule completely undermines the statutory balance, in which an enforceable no-strike clause is the *quid pro quo* for the employer's promise to submit disputes to arbitration during the term of a collective bargaining agreement.

In any event, the collective bargaining language at issue here had been repeatedly construed in impartial arbitration to permit harsher discipline for union officials who violate the no-strike clause. Collective bargaining contracts that so provide are unquestionably enforceable, and as a matter of national labor policy, the Board should not be permitted to ignore such clear construction of the contract language.

ARGUMENT

I. Every Employee Who Strikes in Violation of His Collective Bargaining Promise Forfeits the Protection of the Labor Management Relations Act; an Employer Is Free to Discipline or Discharge Any or All Such Employees.

A. Strikes in Violation of No-Strike Clauses Are Unprotected as a Matter of Fundamental National Labor Policy.

This Court has always held that any employee who participates in a work stoppage that violates a no-strike collective bargaining promise is unprotected by the Labor Management Relations Act (the "Act"). *Nolde Brothers v. Local 358, Bakery and Confectionery Workers' Union*, 430 U. S. 243 (1977); *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238, 246 (1962); *Mastro Plastics Corp. v. NLRB*, 350 U. S. 270 (1956); *NLRB v. Rockaway News Supply Co.*, 345 U. S. 71 (1953); *NLRB v. Sands Mfg. Co.*, 306 U. S. 332 (1939). The no-strike pledge, whose effectiveness this principle protects, is the cornerstone of the system created by the Act—the substitution of a contractual ordering of the relations between management and labor for the "industrial warfare" of strikes and lockouts.

To constrict an employer's freedom to enforce this promise, as the Board and the Court of Appeals have done in this case, is to undermine the fundamental national labor policy. As this Court explained in one of the first cases decided under the National Labor Relations Act of 1936:

> The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may

> bring about the adjustments and agreements which the Act in itself does not attempt to compel.
> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937).

In other words, "[T]he basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare." *Teamsters Local 174 v. Lucas Flour Company*, 369 U. S. 95, 105 (1962).

The principles this Court has developed to effectuate this policy demonstrate the depth of this commitment to the collective bargaining agreement. Not only may a union bargain away employees' right to strike, *Mastro Plastics, supra*, the union's status as the sole representative in dealing with the employer is so important that unauthorized strikes are also deemed unprotected activity, even in the absence of a no-strike obligation in the collective bargaining agreement. *Lucas Flour, supra.* Moreover, an employer may in appropriate cases obtain injunctive relief to halt an ongoing violation of a no-strike promise. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U. S. 235 (1970).

Similarly, it has been held that an employer need not fire every employee who engages in unprotected activity. An employer may "pick and choose" among employees who lose the protection of the Act. *NLRB v. Fansteel Metallurgical Corporation*, 306 U. S. 240, 259 (1939). The discipline of union officers Lang and Light, whose participation in the stoppage did more harm to the integrity of the collective bargaining system than did participation of the rank and file, fully accords with these principles.

B. Congress Intended That Employers Would Have Complete Freedom to Decide on the Severity of Discipline for Any Employee Who Violates a No-Strike Clause.

The history and provisions of the Labor Management Relations Act of 1947, by which Congress amended the National Labor Relations Act, leave no doubt that Congress intended employers to have complete freedom to discipline or discharge employees who strike in violation of their collective bargaining agreements. The Act was passed following a decade of increasingly lengthy and disruptive strikes, and was intended to establish a proper balance between the power of employers and that of unions. It represented a shift in Congressional focus "from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Gateway Coal Company v. United Mineworkers of America*, 414 U. S. 368, 381 (1974), quoting *Boys Markets, Inc., supra*, 398 U. S. at 251. The central purpose of those amendments was to shore up the enforceability of collective bargaining agreements. Specifically, the Congress wanted to assure that no-strike promises would be respected. As stated in the Senate report on the Taft Senate bill:

> **The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract. S. Rep. No. 105, 80th Cong., 1st Sess. 16 (1947).**

Having set out to make collective bargaining contracts more enforceable, Congress gave detailed consideration to the ways in which violations were to be prevented and remedied. It enacted Section 301, which provides for damage actions against unions and employers who violate collective bargaining agreements. And as this Court has recently held, Congress considered and expressly rejected the concept of liability for damages against individual employees who violate these agreements. *Complete Auto Transit, Inc. v. Reis*, 451 U. S. 401 (1981). But as the Court also recognized in the *Complete Auto* case, Congress

> opted for a discharge remedy for violations of § 303 by individuals, rather than for the damages remedy that had been proposed by the House. At the same time, it preferred discharge as the employer's remedy under § 301 where employees violate the no-strike provision of their collective bargaining agreement. *Id.* at 415.

The legislative history reflects this choice clearly. House bill H. R. 3020, 80th Cong., 1st Sess. (1947), would have amended Section 7 of the National Labor Relations Act [1] to include a statement clarifying that employees only had the protection of the Act for activities "not constituting . . . violations of collective bargaining agreements."

1. Section 7 states the right of employees to engage in concerted activities: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." 29 U. S. C. § 157.

The House Report explaining this change cited as "obviously . . . correct decisions" this Court's holdings in the *Fansteel* case, *supra,* and in *Southern Steamship Company v. NLRB,* 316 U. S. 31 (1942),[2] and declared it the intent of the amendment to write these rules into the Act. H. R. Rep. No. 245, 80th Cong., 1st Sess. 27-28 (1947).

The bill passed the House containing the amendment. The Senate's version omitted this language, however, and the House-Senate conferees dropped it from the final bill. Their reasons are instructive:

> Thus the courts have firmly established the rule that under the existing provisions of Section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. . . .
>
> The reasoning of [recent] decisions appears to have had the effect of overruling such decisions of the Board . . . wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.
>
> By reason of the foregoing, it was believed that the specific provisions in the House bill excepting . . . violations of collective bargaining agreements from the protection of section 7 were unnecessary.
>
> H. R. Conf. Rep. No. 510, 80th Cong. 1st Sess. 38-39 (1947).

The Conference Report went on to describe the amended declaration of policy to "demonstrate a clear intention

2. These decisions held that an employer could discharge any employee who engaged in an unprotected strike, and "stood absolved . . . from any duty to reemploy them, but was nevertheless free to consider the exigencies of its own business, and to offer re-employment if it chose." *Fansteel, supra,* 306 U. S. at 259.

that *these undesirable concerted activities are not to have any protection* under the act . . . ." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 39 (1947) (emphasis supplied).

Even more importantly, Conferees went on to note that in Section 10(c) of the amended act

> it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity.
> *Id.*

As enacted into law, Section 10(c) of the Labor Management Relations Act contains the following proviso: "No order of the Board shall require the reinstatement of *any* individual as an employee who has been suspended . . . or discharged for cause." 29 U. S. C. § 160(c) (emphasis supplied). As is plain from the portion of the Conference Report quoted above, this specific prohibition applies in this case, where Lang and Light were suspended for concerted activity that was concededly unprotected. Thus, the Board's order contravenes the express terms of Section 10(c) of the Act.

Accordingly, whether one relies on the absolute terms of the Act or on the unequivocal intent expressed in its legislative history, the result is the same. The Board was without the authority to condemn Metropolitan Edison's choice of action in disciplining employees for their participation in an unprotected strike, or (to use the Conferees' words) to involve itself in an attempt

to "distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement." H. R. Conf. Rep. No. 510, 80th Cong. 1st Sess. 39 (1947).

II. The Option of Harsher Discipline for Union Officials Who Violate No-Strike Clauses Promotes the Goals of the Act.

It has been suggested with much force that in choosing among the potential remedies to make available to the employer, Congress chose too narrowly, limiting the employer to cumbersome or unrealistic options. *Complete Auto Transit v. Reis*, 451 U. S. 401, 417-424 (1981) (opinion of Powell, J.). With the rule it followed in this case, the Board has severely crippled the one remedy Congress plainly meant to leave employers—the right to pick and choose among those to be discharged or suspended for violating their pledge to arbitrate their differences with management. Adding these further restrictions to the employer's freedom of action completely destroys the statutory balance.

The option of selective discipline is an essential element of the employer's right to discipline. As Justice Powell pointed out in the *Complete Auto* case, *supra*, an employer may not have the practical option of resorting to wholesale discharge or suspension because such an act would cripple production. On the other hand, reducing the discipline to an across-the-board slap on the wrist may be utterly without effect in preventing a recurrence of such strikes.[3] Moreover, because even the Board recognizes the right to discipline strike leaders

3. Indeed, as the experience reflected in this record demonstrates, discipline of individuals cannot guarantee that unauthorized or illegal stoppages will not recur.

selectively, the Board's rule requiring special treatment for union officers subjects an employer to the spectre of repeated litigation—before an arbitrator or the Board—on the issue of a union officer's role in an illegal strike. Not only does this rule destroy the effectiveness of one of the only tools left to the employer to enforce collective bargaining agreements, it ignores the natural leadership position that union officers occupy in any strike in which they participate.

A. Permitting Harsher Discipline for Union Officials Merely Recognizes Their Inevitable Leadership of Any Stoppage in Which They Participate.

In attempting to engraft a special rule for officers onto the statutory scheme, the Board sweeps aside both decades of arbitral authority and the realities of industrial life. It is worth noting at the outset that until its decision in *Midwest Precision Castings Company*, 233 NLRB 183 (1977), the Board in an unbroken line of cases had charged union officers with a greater responsibility to know of and to uphold the no-strike provisions of collective bargaining agreements. *See, e.g., Riviera Manufacturing Company*, 167 NLRB 772 (1967); *University Overland Express, Inc.*, 129 NLRB 82 (1960); *Stockham Pipe Fittings Company*, 84 NLRB 629 (1949). At the very least, this history refutes the notion implicit in the Board's new doctrine that the enforcement of such obligations discourages workers from holding union office. Unions hardly have had trouble finding leaders over the years, despite the consistent earlier holdings that officers take on duties as well as privileges [4] when they achieve union office.

The Board's new doctrine also ignores the reality that labor arbitrators have recognized for years: union officers,

4. Union officership can carry with it certain preferential treatment, including "superseniority" for purposes of layoff and recall.

who are the representatives chosen by the employees to deal for them with management, necessarily are leaders of any work stoppage in which they participate. It is incongruous to suggest that an officer somehow sheds his mantle of leadership when he joins a work stoppage, and arbitrators have consistently adopted the logical proposition that a union officer who joins a strike naturally becomes a leader of it. As one arbitrator put it:

> When Union Stewards and other Union officers participate in an illegal walkout, by the mere fact of that participation as Union officials, they provide leadership support for the strike, leadership which inescapably goes beyond the mere following of other workmen who have no recognized and official leadership positions in the Union.
> *Litton Systems, Incorporated*, 71-1 Lab. Arb. Awards (CCH) ¶ 8215 at 3710-11 (1971, Abernathy).

See also, e.g., McGough Bakeries Corporation, 68-1 Lab. Arb. Awards (CCH) ¶ 8264 (1967, Eyraud); *International Harvester Co.*, 14 Lab. Arb. (BNA) 986, 988 (1950, Seward). Indeed, some recent pronouncements of the Board itself reaffirm this obvious proposition. In *Chrysler Corporation, Dodge Truck Plant*, 232 NLRB 466 (1977), the Board upheld a decision approving discharge of a union shop steward for his role in a wildcat work stoppage, and adopted the following language:

> Smith was elected to his position as shop steward by the second-shift employees in his department on two occasions. *He did not cease to be a leader of these people in matters involving labor relations merely by leaving the plant gates* . . . . Accordingly, in light of considerations relating to his status alone, in addition to his actions on the afternoon and evening in ques-

> tion, *I conclude that Smith not only was engaged in an illegal walkout but that his presence provided this action with his active approval and encouragement,* not merely negative leadership, and that respondent had ample basis for concluding that Smith exercised a leadership role in his walkout when it determined to discharge him. . . .
> 232 NLRB at 475.

Or as the Board wrote in *Teamsters Local 886 (Lee Way Motor Freight)*, 229 NLRB 832, 833 (1977), "A steward is the first union representative the members look to, and the man from whom they take their clues insofar as union policy is concerned." Certainly the actions and directions of the local president and vice-president would inevitably carry the same sway.

Even the Board has consistently held that an employer may selectively discharge or suspend the ringleaders of an unprotected strike if it pleases. *Chesty Foods*, 215 NLRB 388 (1974); *American Beef Packers, Inc.*, 196 NLRB 875 (1972); *J. P. Weatherby Construction Corp.*, 182 NLRB 690 (1970). The new special rule for union officers, contradicted by the Board's own earlier decisions, is an illogical aberration from national labor policy. The response to the Board's new position cannot be better put than it was by another panel of the Court of Appeals for the Third Circuit and echoed by Judge Van Dusen in dissent below:

> As for the contention that as a result of this ruling prospective stewards will be dissuaded from seeking union office, an obvious and short answer is that they should be deterred from seeking office if they intend thereafter to participate in illegal work stoppages or to repudiate contractual obligations which were freely

> negotiated and voluntarily assumed. The company's action and our ruling deters no other kind of 'union' activity.
>
> 663 F. 2d 478, 487, *quoting Gould Inc. v. NLRB*, 612 F. 2d 728, 733, *cert. denied sub nom. Moran v. Gould Corp.*, 449 U. S. 890 (1980).

B. The "Common Law of the Shop" Has Consistently Charged Union Officers With a Greater Responsibility to Know of and to Uphold No-Strike Clauses.

This Court held in *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U. S. 574, 581-82 (1960), that "the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." The proposition that union officials are particularly responsible to uphold their collective bargaining promises is firmly rooted in industry practice. Recognizing the facts of industrial life, arbitrators have over the years consistently charged union officers with an enhanced responsibility to uphold the no-strike provisions of collective bargaining agreements. As one arbitrator expressed it:

> **If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all of the provisions of the Collective Bargaining Agreement and to actively instruct each employee to do so as well. While it is improper for an ordinary employee to deliberately breach the Agreement, a similar act by a shop steward is untenable and grounds for his discharge.**
>
> . . .

> [A]ll the economic conditions bargained and agreed to for a specific term could be negated if the no-strike clause or the arbitration provisions are disregarded. Hence for shop stewards to be willing or participating parties, or principals themselves, in contravention of either or both of these contract cornerstones, is so obviously inimical to the contract and so inconsistent with the role of the steward as to require no further elaboration or explanation. *United Parcel Service, Inc.*, 47 Lab. Arb. (BNA) 1100, 1102 (1966, Schmertz).

Accord, Elgin Sweeper Company, 68-2 Lab. Arb. Awards (CCH) ¶ 8642 (1968, Graff); *Southwest Potash Corporation*, 69-2 Lab. Arb. Awards (CCH) ¶ 8829 (1969, Oppenheim); *Reliance Electric and Engineering Company*, 69-1 Lab. Arb. Awards (CCH) ¶ 8215 (1968, Lewis); *Sealright Company, Inc.*, 69-2 Lab. Arb. Awards (CCH) ¶ 8778 (1969, Belcher); *Acme Boot Company*, 52 Lab. Arb. (BNA) 585 (1969, Oppenheim); *Huntington Baking Company, Inc.*, 68-1 Lab. Arb. Awards (CCH) ¶ 8180 (1967, Jaffee); *McGraw-Edison Company*, 62-3 Lab. Arb. Awards (CCH) ¶ 8775 (1962, Howlett); *Drake Manufacturing Company*, 64-1 Lab. Arb. Awards (CCH) ¶ 8166 (1963, Markowitz); *Homer Laughlin China Company*, 64-1 Lab. Arb. Awards (CCH) ¶ 8277 (1963, Kates); *Skenandoa Rayon Corporation*, 21 Lab. Arb. (BNA) 421 (1953, Feinberg); *Philco Corporation*, 62-2 Lab. Arb. Awards (CCH) ¶ 8655 (1962, Marshall); *Union Tank Car Company*, 62-2 Lab. Arb. Awards (CCH) ¶ 8678 (1962, Klamon).

The Board's new policy is not supportable as a matter of logic or as sound policy. Its arbitrary about-face on the vital proposition that an employer may selectively discipline illegal strikers should be rejected.

III. In Any Event, the Terms of a Collective Bargaining Agreement as Interpreted by Impartial Arbitrators May Not Be Ignored by the Board and the Courts.

As is set out at length above, the express terms of the Act, its legislative history, and decades of arbitral experience all command that employers' discretion in disciplining illegal strikers be unfettered. This case, however, presents an independent basis for sustaining harsher discipline for union officers; here such discipline was part of the parties' own collective bargaining agreement. Prior decisions of impartial arbitrators had construed the very collective bargaining language at issue here to impose higher duties on union officials. Moreover, in the face of such constructions, the parties had repeatedly executed contracts containing the same language. Accordingly, the harsher discipline of the officers should be upheld in any event.

There should be no doubt that a contract which makes union officers particularly responsible to uphold the collective bargaining agreement is enforceable. Every Court of Appeals that has considered the validity of collective bargaining agreements imposing higher duties on union officials to uphold them, has found such agreements enforceable. *Gould Inc. v. NLRB, enf. denied,* 612 F. 2d 728 (3d Cir. 1979), *cert. denied sub. nom. Moran v. Gould Inc.,* 449 U. S. 890 (1980); *Indiana & Michigan Electric Co. v. NLRB,* 599 F. 2d 227, *enf. denied* (7th Cir. 1979); *Fournelle v. NLRB,* 670 F. 2d 331 (D. C. Cir. 1982). Different treatment of a group of employees has never been considered invalid in and of itself. As this Court wrote in *Ford Motor Co. v. Huffman,* 345 U. S. 330, 338 (1953):

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect

> individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Because the principal goal of national labor policy is to foster the governance by contract of relations between employers and their employees, judicial nullification of contractual concessions is limited to those provisions which violate clear policies of federal labor law, or undermine the representative process itself. *NLRB v. Magnavox Co.*, 415 U. S. 322 (1974). One can only assume that the no-strike clause in this contract was a concession to the Company arrived at after hard, arms-length bargaining. As the Board has pointed out:

> [W]e recogniz[e] the salutary purpose of refusing to disturb 'concessions yielded by either party through the processes of collective bargaining even where such a concession may infringe upon rights guaranteed employees under Section 7 of the Act.' . . . [T]he validity of a particular concession or waiver must depend upon whether the interference with the employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver, or would unduly hamper the employees in exercising their basic rights under the Act.
>
> *General Motors Corporation*, 158 NLRB 1723, 1726 (1966), quoting *Gale Products Division*, 142 NLRB 1246, 1248-49 (1963).

Courts have long held that unions, through collective bargaining agreements, may waive the right to strike during the contract term. *E.g., Mastro Plastics Corp. v. NLRB*, 350 U. S. 270 (1956). Indeed, if the parties may negotiate contract terms that provide the privilege of limited super-seniority for union officials, *NLRB v. Milk Drivers Local 338*, 531 F. 2d 1162 (2d Cir. 1976), then certainly they may negotiate contracts imposing reasonable duties upon them. Such terms clearly promote the effective enforcement of contractual no-strike clauses.

In this case, there were two previous arbitrators' decisions clearly construing identical language in earlier collective bargaining agreements between Metropolitan Edison and the Union to impose on union officials a greater duty to uphold the no-strike clause. This Court should not permit such determinations to be ignored by the Board or courts. As this Court wrote in another context:

> To have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements. We view Congress' decision not to give the Board that broad power as a refusal to take this step.
> *NLRB v. C & C Plywood Corp.*, 385 U. S. 421, 427-8 (1967).

Such arbitral construction of agreements is not only permissible, it is an integral part of the statutory scheme. As the Court explained in the *Warrior & Gulf Navigation* case, *supra*, it is the duty of arbitrators to elaborate and fill "gaps" in the agreement "by reference to the practices of the particular industry and of the various shops covered by the agreement." 363 U. S. at 580. And as the Court further pointed out in that case:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government.
>
> . . .
>
> [T]he parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.
>
> *Id.* at 581, 582.

The Board and the courts strike at that heart when they refuse to accord deference to a settled construction of the parties' collective bargaining agreement. Such actions arrogate to the Board powers not given to it by Congress. This Court put it well in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U. S. 593, 599 (1960):

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Accordingly, the Board and the Court of Appeals erred in any event when they refused to defer to clear decisions of arbitrators as to the meaning of the contract. As a matter of contract, these officers committed a more serious violation than the rank and file when they struck

in violation of their pledge not to strike. Their greater discipline was therefore appropriate for this independent reason.

CONCLUSION

For all of the above reasons, the Court should reverse the decision of the United States Court of Appeals for the Third Circuit, and remand with instructions to dismiss the charges against the employer.

Respectfully submitted,

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No. 81-1664

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON COMPANY,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD
and
LOCAL UNION 563, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER IN SUPPORT OF REVERSAL

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ISSUE PRESENTED

Does the National Labor Relations Act forbid an employer from disciplining employees who are union officials[1] more harshly than rank and file members for

[1] For convenience of reference, we use the term "steward" herein to refer to any classification of union official working for the employer who is subject to the collective bargaining agreement. This, of course, may include, as in the subject case, the president or vice president of the union, or any other person acting in a representative capacity for the union.

their participation in a wildcat strike which is concededly barred by the collective bargaining agreement and therefore unprotected activity under the Act?

This brief of the Edison Electric Institute, as *amicus curiae*, is filed with the written consents of the parties pursuant to this Court's Rule 36. The *amicus* supports the position of the petitioner and urges reversal of the decision below of the Court of Appeals for the Third Circuit.

THE INTEREST OF THE AMICUS CURIAE

The Edison Electric Institute (EEI) is the association of America's investor-owned electric utility companies. Its member companies serve 77% of the nation's electricity users and 99% of all customers of the investor-owned segment of the electrical utility industry.

The principal objective of EEI's membership is to satisfy the nation's continuing needs for uninterrupted electricity service at the lowest possible cost to consumers. To meet these needs for electricity, EEI members regularly engage in construction of massive electric generation facilities such as the one involved in this case. A substantial portion of this work is performed with union labor under collective bargaining agreements. It is not uncommon on these projects to employ thousands of construction tradesmen operating under as many as a dozen separate collective bargaining agreements.

Given the number of employees and crafts involved, a critical objective in any such bargaining agreement is the unions' commitment not to strike for the duration of the contract. A strike by even a small group on a site will often trigger, in falling domino fashion, a total shutdown of the project as various trades respect the picket line.

These interruptions harm the public interest by substantially delaying the introduction of needed electric service.

Wholly apart from the delays in needed service imposed by strikes where new construction or renovation is under way, there is the need for uninterrupted production of electricity in ongoing existing facilities. Inasmuch as a substantial number of these facilities are subject to union contracts, the prospect of work stoppages in violation of contract is an ever-present hazard. In peak demand periods this can result in reductions in service and selective shutdowns in service to prevent failure of an entire system.

Thus, adherence to no-strike clauses is essential in the electric utility industry. Even in the situation of a union-sponsored strike in violation of a no-strike clause, conventional legal remedies are cumbersome. If the underlying dispute is arbitrable, injunctive relief may lie, but obtaining that relief can take days. A damage action against the union, as a practical matter, may have to be waived in exchange for returning the employees to work. And the prospect of mass discharges for unprotected conduct may jeopardize the supply of labor needed to complete the project or to provide uninterrupted continuation of full service.

Unsatisfactory as these avenues of relief are in the conventional strike situation, they are exacerbated in the case of wildcat strikes, for damages are not recoverable against the wildcatting employees or against an unsponsoring union. If the dispute is not directly arbitrable under the striking union's contract, as it is not in sympathy strikes, an injunction to halt the strike will not be issued either. Moreover, unions are, in our members' experience, loathe to impose coercive sanctions on their

offending members. Thus, the key lies in prevention of the wildcat, and if that fails, the quick return to work of the offending employees.

Of course, discipline and discharge are available, but sound national labor policy must be geared to prevention. This is best accomplished through union stewards—the union leaders on the site most familiar with the potential wildcatters. National labor policy requires that these stewards set an example for the rank and file by doing two things: working in the face of a wildcat strike, which involves nothing more revolutionary than abiding by their contract; and using good faith efforts to bring about a cessation of the unlawful activity.

As discussed more fully in this brief, Edison Electric Institute believes that effectuation of sound uniform national labor policy requires this Court to declare that there is an implied covenant in no-strike agreements that union stewards have a duty to set an example and honor the agreement, by working during a wildcat strike, and by using good faith efforts to return the wildcatters to work. The means for enforcing this modest duty on the part of union stewards is the restraining prospect of discipline for breach of that duty. EEI believes the practical benefits flowing from these minimum implied obligations are wholly consistent with the National Labor Relations Act, and indeed, the public interest.

SUMMARY OF ARGUMENT

I

1. The conflicting legal tests applied by the Board and the lower courts for determining whether stewards may be given harsher discipline for their participation in unprotected wildcat strikes suffer from a common and fatal analytical defect. Both ignore the fact that the underlying

conduct—participation in a wildcat strike in violation of a no-strike clause—is wholly unprotected by the Act. Where the underlying conduct is unprotected the participants operate at their peril without standing to invoke the protections of the Act regarding the discipline received for their unprotected activity.

2. Rank and file employees concededly may be disciplined disparately—indeed the employer may pick and choose which strikers are to be disciplined at all—for their participation in wildcat strikes. There is no reason for a different result to attach simply because a participant is a steward.

3. Whether or not the holding of a steward's position is "the essence of protected activities," it is anomalous indeed to suggest that his "office" insulates him from his own unprotected conduct in derogation of contractual obligations. Discipline is being imposed for activities which are not only unprotected but are in defiance of the very contract the steward is obligated to uphold. Accordingly, the steward is not being disciplined for the office he holds, but rather for his acts and omissions in abdicating the responsibilities of that office.

4. Similarly, the Court's decision in *NLRB* v. *Great Dane Trailers Inc.*, 388 U.S. 26 (1967), dealing with conduct "inherently destructive of important employee rights" has no application here, since the underlying unlawful conduct gives rise to no rights, "important" or otherwise, subject to the Act's protections.

5. Finally, there is no discrimination here because stewards and rank and file employees are different classes. Further, the statutory predicate for a finding of discrimination proscribed by Section 8(a)(3) is lacking here because one of the basic elements underlying a

violation—conduct which encourages or discourages union *membership*—is absent.

II

1. Contractual commitments not to strike are the cornerstone of the Act's chief purpose of assuring industrial peace. In failing to place particular responsibilities on the union officials to see to it that the employees they represent do not undermine such clauses, the Board and lower court decisions seriously erode that cornerstone.

2. Sound uniform national labor policy requires that contractual no-strike clauses be subject to an implied covenant that stewards will honor the contract and make good faith efforts to assure that members do the same. Arbitrators have been faithful to the principle that stewards, as the official representatives of the union which has undertaken the commitment not to strike, have a higher duty than others to remain true to that commitment. The Board itself has repeatedly recognized the particular obligation of stewards to assure compliance with the terms of the contract, and has endorsed enhanced contractual *protections* for stewards and other union officials under the Act, e.g., superseniority for purposes of lay off and recall. It is a fair corollary to this favored status to impose commensurate obligations upon stewards above those required of the rank and file members. Stewards, after all, occupy a leadership position and may well have negotiated the very no-strike clauses flouted in wildcat strikes.

3. This Court has inferred contractual obligations in the past to effectuate sound uniform national labor policy, and should do so again now by adopting the recommended approach. At bottom, there is no other effective deterent

to wildcat strikes. Surely the approach of the court below which inevitably raises the prospect of litigation over the meaning of the contract terms and their bargaining history each time a steward is disciplined, falls far short of such a deterrent. Under the implied duty we propose, the burden on the steward is minimal, and is a natural and fair adjunct of his position.

4. The decisions below seriously undermine uniform national labor policy by pitting the Board and the courts against firmly established arbitral authority which sustains harsher discipline for stewards who breach no-strike clauses.

ARGUMENT

I. The Respective Legal Tests Applied By The Board And Lower Courts For Determining Whether Union Stewards May Be More Harshly Disciplined Than Rank And File Members For Participation In Unprotected Wildcat Strikes Are Fundamentally Erroneous And Have Hindered Uniform Administration Of The National Labor Relations Act

Both the Board and various Courts of Appeals have adopted conflicting tests for determining whether stewards may be disciplined more harshly than rank and file members for participating in unlawful wildcat strikes. As is shown below, each of these tests is fundamentally erroneous because each is predicated upon the legally erroneous assumption that the steward's activity is somehow protected by the Act. Lost in the maze of unduly intricate analysis is the salient fact that the activity at issue plainly is unprotected by Section 7 of the Act. Accordingly, the rights granted by Section 7, which are confined to the benefit of persons engaged in *protected* conduct, have no application here.

The Board's latest approach,[2] characterized by its lead decisions in *Precision Castings Co.*[3] and *Gould Inc.*,[4] is a *per se* approach: *any* disciplinary differences issued to a steward are *per se* impermissible. This rule is predicated on the reasoning that the steward's office embodies the essence of protected concerted activities. Hence, so the Board's reasoning goes, disparate treatment of stewards necessarily is discrimination based on union office and therefore necessarily interferes with Section 7 rights.

The lower courts uniformly have rejected the Board's *per se* test and have instead fashioned conflicting approaches. Most circuits have analyzed collective bargaining agreements on a case-by-case basis to determine whether the contract imposed upon the steward affirmative duties to stop the wildcat strike. Where such duties were imposed upon the steward by contract, the courts have found them to constitute both a contractual basis for increased discipline of the steward and waiver of a Section 7 "right" not to be disparately disciplined.[5] Conversely, where the contract was found not *expressly* to impose

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[2] In the same year the Board decided *Precision Castings, infra*, it held in *Super Valu Xenia*, 228 NLRB 1254 (1977) that more severe discipline for stewards' wildcat strike participation *was* consistent with the Act. The Board has also upheld greater discipline for stewards' participation in wildcat strikes in *Russell Packing Co.*, 133 NLRB 194 (1961); *University Overland Express, Inc.*, 129 NLRB 82 (1960); and *Stockham Pipe Fittings Co.*, 84 NLRB 629 (1949).

[3] *Precision Castings Co.*, 233 NLRB 183 (1977).

[4] *Gould Inc.*, 237 NLRB 881 (1978); enf. denied, 612 F.2d 728 (3d Cir. 1979).

[5] *Gould Inc.* v. *NLRB*, 612 F.2d 728 (3d Cir. 1979); *Fournelle* v. *NLRB*, ___ F.2d ___, 109 LRRM 2441 (D.C. Cir. 1982).

affirmative obligations on the steward, no waiver was found[6] and the increased discipline was declared improper.[7] In still another, but far more sound line of cases, courts have approved more severe discipline on the basis of statutory rather than contractual analysis.[8] The

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[6] *Metropolitan Edison Co.* v. *NLRB*, 663 F.2d 478 (3d Cir. 1981); *Hammermill Paper Co.* v. *NLRB*, 658 F.2d 155 (3d Cir. 1981); *C. H. Heist Co.* v. *NLRB*, 657 NLRB 178 (7th Cir. 1981); *Szewczuga & Treichel* v. *NLRB (Miller Brewing Co.)*, ___ F.2d ___ (D.C. Cir. No. 81-1054, Aug. 17, 1982).

[7] Apart from the serious legal deficiencies in applying the theory of waiver to activity which is unprotected from its very inception—which we discuss more fully below—the lower courts' emphasis on "waiver" is unworkable and doubtless will yield inconsistent results rather than promote uniform national labor policy. Contracts run the gamut of gradations in degrees of affirmative obligations imposed on stewards and thus give rise to the questions of not only whether, but also to what extent, waiver has occurred.

Thus, in *Indiana & Michigan Electric Co.* v. *NLRB*, 599 F.2d 227 (7th Cir. 1979), the affirmative obligations of the steward were dubious. There the contract merely provided that continuous employer operation was "essential" and that "employees will not be called upon or permitted to cease or abstain from the continuous performance of [their] duties . . ." Similarly, in *Fournelle*, *supra*, the contractual basis said to permit enhanced discipline was difficult to discern, ___ F.2d at ___ 109 LRRM at 2442. In contrast, the waiver found in *Gould* was supported by a clear affirmative obligation of the union officers to "immediately take positive and evident steps to have those involved cease such activity." Indeed, indicative of the confusion wrought by this contract waiver test was the Seventh Circuit's *Heist* decision, *supra*, 567 F.2d at 183, which characterized the contractual basis for waiver in that circuit's earlier *Indiana Electric* decision as "tenuous."

[8] *Indiana and Michigan Electric Co.* v. *NLRB*, *supra*; *NLRB* v. *Armour-Dial, Inc.*, 638 F.2d 51 (8th Cir. 1981).

Seventh Circuit, in *Indiana & Michigan Electric Co.* v. *NLRB*, *supra*, rejected the Board's approach as legally erroneous on the grounds that the steward was not being disciplined for his status as a steward but rather for his derelictions as the representative of a party to the contract and hence was not the object of discrimination within the meaning of Section 8(a)(3) of the Act.

The conflicting approaches of the Board and most circuits, we respectfully submit, miss the mark by bypassing the unprotected nature of the activity. Section 7 of the Act plainly does not immunize all concerted activities, but only *protected* concerted activities. If a concerted activity is not protected, the employee is without the protection of the Act. Since the strike in violation of the no-strike clause is concededly unprotected, all participants in that unlawful venture operate at their peril outside the protection of the Act.[9] Once outside the protection of the Act, they may not invoke the Act's protection to complain about the disparate nature of their discipline. Yet the Board and lower courts' analyses are fatally flawed by their omission of this critical step of analysis. Perhaps for the first time in the history of the Act they have, without apparent cognizance of the fact, extended the Act's protections to participation in *unprotected* activity. To do so works a substantial dislocation in the Act which, from the beginning, cloaked only activity which was both concerted *and* protected.

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[9] Compare *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 102 U.S. 216, 221 (1981).

The point was well stated by the court in *Hoover Co.* v. *NLRB*, 191 F.2d 380, 386 (6th Cir. 1951).

> The Act does not confer an absolute right upon employees to engage in every kind of strike or other concerted activity; and the fact that certain concerted activity is explicitly protected by the statute, does not mean that improper concerted activity is also protected.

Similarly, as this Court observed in *NLRB* v. *IBEW Local 1229*, 346 U.S. 464, 477-478 (1953):

> Even if the attack were to be treated as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in § 7, the means used by the technicians in conducting the attack *have deprived the attackers of the protection of that section*, when read in the light and context of the purpose of that section. (Footnote omitted; emphasis added).

In short, by removing themselves from the protection of the Act by their own volition, the stewards have no standing to invoke the Act's protections over the relative discipline they received. Indeed, this principle is rooted in the rule recognized by this Court early in the administration of the Act, that the employer may pick and choose among those employees to be disciplined for engaging in unprotected strikes in breach of a contractual no strike clause.[10] If rank and file employees may thus be treated disparately with respect to discipline for unprotected activity, there is no reason why union stewards should become entitled to a greater degree of insulation from their acts as decreed by the Board here.

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[10] See *NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332, 345 (1939); *NLRB* v. *Rockaway News Supply Co., Inc.*, 345 U.S. 71 (1953).

The Board, relying solely on its decision in *Pontiac Motor Division, General Motors Corp.*, 132 NLRB 413, 415 (1961) argues that disciplinary distinctions may not be drawn solely upon the basis of union stewardship. However, both that case and the proposition for which it is cited have no bearing on the case at hand. In *General Motors* the disciplined stewards did not participate in the unlawful activity and hence did not lose the protections of Section 7. Here, however, the stewards did engage in activity which forfeited their right to claim Section 7 protections which might otherwise be available. Hence, whether union office embodies concerted activity in a *protected* context is wholly beside the point here. The Board's reliance on its *General Motors* decision is nothing more than bootstrapping of the worst order.

Similarly infecting the Board's analysis is its reliance upon this Court's decision in *NLRB* v. *Great Dane Trailers, Inc., supra*, 388 U.S. at 34, which held that conduct "inherently destructive *of important employee rights*" may be presumed discriminatory even without proof of anti-union motivation (emphasis added). The italicized words, however, are words of limitation which the Board ignores. There is *no* "important employee right" to engage in unlawful unprotected conduct.[11] Hence, the greater discipline for the steward who, of his own volition, participates in the unlawful strike intrudes on no "impor-

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[11] More in point is this Court's decision in *Burdine* v. *Texas Dept. of Comm. Affairs*, ___ U.S. ___, 25 FEP Cases 114 (1981) which ruled that if a *prima facie* case of discrimination is proven, the burden to articulate a legitimate nondiscriminatory reason for the employer's action shifts to him, and neutralizes the *prima facie* case unless proven to be pretextual.

tant employee right" properly cognizable by the Act. It is not his office that is the basis for his discipline as it was in *General Motors* where the steward did not even participate in the strike; it is, instead, his acts (participation) coupled with his omissions (to set a lawful example for employees to follow) that justify punishment to fit the wrong.

Moreover, in any event, the more severe discipline for stewards involved here does not constitute discrimination within the meaning of Section 8(a)(3) of the Act, for at least two reasons. First, there is no discrimination because like entities are not being compared. There are, instead, stewards on the one hand and rank and file members on the other. As is discussed in Part II of this brief, that stewards can lawfully be treated differently from rank and file members is a legal distinction of substance well settled in the administration of the Act. It is in recognition of their separate status under the Act that stewards are able to obtain *privileges* under the Act not available to rank and file employees (discussed *infra*). Because stewards and members are separate classes, the obvious predicate for "discrimination" is lacking, thus rendering the increased discipline for the stewards not discriminatory and hence outside the reach of Section 8(a)(3).

Second, the employer's action in disciplining stewards in the face of a wildcat strike does not fulfill the second element of a violation under Section 8(a)(3). As pointed out by this Court in *Radio Officers Union* v. *NLRB*, 347 U.S. 17, 42-43 (1954):

> Nor does this section [8(a)(3)] outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

Thus, even assuming, but not conceding, that the enhanced discipline for stewards here was "discriminatory" within the meaning of Section 8(a)(3), the second element of a Section 8(a)(3) violation is lacking for the disciplinary differences are wholly neutral so far as encouraging or discouraging union *membership*.[12] It is plain that Section 8(a)(3) is intended to prevent discrimination against union membership generally, but not discrimination which may encourage or discouraging the voluntary assumption of union office.

For all of the above reasons, the *per se* approach of the Board and the contract "waiver" analysis of the lower courts are misplaced. The stewards' conduct was unprotected by the Act and not destructive, inherently or otherwise, of any right legitimately secured by the Act. Instead of the misplaced conflicting approaches of the Board and lower courts, the only proper approach, it is respectfully submitted, is to effectuate national labor policy by construing all no-strike clauses so as to infer a steward's obligation to comply with the contract in the face of a wildcat strike and to use good faith efforts to stop the strike, upon pain of more severe discipline for his failure to do so.

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[12] See dissenting opinion of Board Member Penello in *Gould Corp.*, *supra*, 237 NLRB at 884.

II. Sound National Labor Policy Requires That Industrial Peace Be Best Secured By Emphasizing A Contractual Obligation That Stewards Honor Contractual No-Strike Commitments And Exert Good Faith Efforts To Secure Members' Adherence; Stewards Who Breach That Obligation Should Be Subject To Independent Discipline Appropriate For Breach Of Their Obligations

Ever since the inception of the Wagner Act in 1935, it has been the bedrock purpose of the National Labor Relations Act to establish mechanisms to "remov[e] certain recognized sources of industrial strife and unrest . . ."[13] No-strike clauses are central to effectuating that cardinal goal of national labor policy. *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448, 455 (1957); *Local 174 Teamsters* v. *Lucas Flour Company*, 369 U.S. 95, 106 (1962); *Boys Markets, Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235, 247-249 (1970).

Indeed, this Court emphasized in *Lincoln Mills*, *supra*, 353 U.S. at 453-454 (footnote omitted):

> Congress was also interested in promoting collective bargaining that ended with agreements not to strike. The Senate Report, *supra*, p. 16 states:
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> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

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[13] Section 1 of Act, 29 U.S.C. § 151.

The Board and lower court decisions seriously undermine sound national labor policy by encouraging disavowal of no-strike commitments by the very group of persons who not only are best suited to bring about prompt compliance by members but who are frequently also responsible for negotiation of the very undertaking they now seek to avoid. And, they do so even though there is no substantial countervailing purpose of the Act to protect. By opting to immunize union stewards at the expense of the sanctity of no-strike commitments, the Board and court below have lost sight of a prime Congressional objective—labor peace. As this Court stated early in the administration of the Act, "[t]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 47 (1942).

The approach of the courts below has been to scrutinize contracts to determine whether stewards have expressly undertaken obligations to take steps to stop violation of the no-strike provisions, and from that to infer a basis for greater discipline of stewards. Such an approach is of far too narrow compass to effectuate sound and uniform national labor policy. The only sound approach, it is respectfully submitted, is for this Court to effectuate uniform national labor policy by interpreting no-strike covenants to imply a contractual obligation that stewards comply with their no-strike commitment and take good faith actions to urge their members do the same. The Board itself has repeatedly recognized as much, albeit not in the decision at hand. Thus, as the Board stated in *Stockham Pipe Fittings Co.*, *supra*, 84 NLRB at 629, in sustaining the discharge of a steward who violated a no-strike clause:

> [W]e are convinced on this record that Falkner, as the admitted leader of the local, and as one of the negotiators and signatories to a valid no-strike agreement between the Union and Respondent, had an even greater duty than the rank and file employees to uphold its provisions.

Accord, *University Overland Express, Inc., supra*, 129 NLRB at 96; *Riviera Mfg. Co.*, 167 NLRB 772, 775 (1967): "There is evidence that he influenced others to follow his example and surely he, as shop steward, should be held to a high standard of conduct."

Such a rule surely would implement the goal of industrial peace. It commands the steward to do no more than honor the contract he is charged to enforce and to act in good faith to try to see to it that others do the same. After all, national labor policy already clothes stewards with *increased protections* of the Act *vis-a-vis* rank and file employees concerning contractual superseniority for purposes of layoff and recall.[14] The rationale for permitting more favored treatment for a union official is to enhance his ability to police the agreement to assure that its terms are honored.

With the privileges of office go its burdens. There is no sound reason not to infer a contractual *enhanced duty* inherent in the steward's position as policeman of the agreement to abide by the agreement and try to get others to do so. His breach of that duty supplies the predicate for disparate discipline. Such a rule would doubtless have a prophylactic effect on the onset of wildcat strikes which burden commerce and would also speed their resolution.

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[14] See e.g., *Auto Warehousers, Inc.*, 227 NLRB 628 (1976); *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975).

This Court has frequently drawn inferences in the past of the kind we are asking it to draw here. It has inferred collective bargaining agreement obligations which it found necessary to effectuate sound uniform national labor policy. In *Lucas Flour*, *supra*, this Court inferred the existence of a no-strike covenant in a contract that did not have one, relying upon the implication arising from a contractual agreement to submit disputes to arbitration. In *Nolde Bros. Inc.* v. *Local 358 Bakery Workers Union*, 430 U.S. 243, 254-255 (1977), this Court inferred a contractual obligation to arbitrate disputes arising under expired collective bargaining agreements, even though arbitration is strictly a creature of contract. The Court inferred this obligation in order to effectuate the national labor policy in favor of arbitration of disputes. Similarly, in *Vaca* v. *Sipes*, 379 U.S. 650 (1965) this Court reaffirmed the rule that unions' contract enforcement powers are subject to an implied covenant in behalf of its members that the union will operate fairly and in good faith.

The reasoning of *Nolde* is particularly instructive. As this Court observed, 430 U.S. at 254, 255:

> It is also noteworthy that the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration as the means of resolving disputes . . . In order to effectuate this policy, this Court has established a strong presumption favoring arbitrability: . . . In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication.

The presumption that union leaders, entrusted with special protections to police such agreements, will do so in good faith by honoring the agreement should similarly imply a basis for a higher steward responsibility unless

the contract expressly disclaims it. Of course, in inferring such obligations the Court is fashioning substantive federal labor law crafted from the fabric of national labor policies. *Textile Workers* v. *Lincoln Mills*, *supra*, 353 U.S. at 456.

The contractual obligation which we propose be inferred from no-strike covenants by this Court perhaps best avoids the need to resort to the more coercive and often ineffective remedies for wildcat action which burden the judiciary. Thus, damages against wildcatting union members under Section 301 are not available to the employer. *Complete Auto Transit, Inc.* v. *Reis*, ___ U.S. ___ 101 S.Ct. 1836 (1981). The other available remedies envisioned by the Court in *Complete Auto* (*id.* at 1845) may be more illusory than practical. Thus, if the union acts innocently, it is immune from damages too. Asking the union to discipline its members is, as a practical matter, not likely to be done nor likely to accomplish much to bring the matter to a speedy conclusion. And injunctive relief will not lie if the underlying dispute, as in the case at bar, is not subject to arbitration. See, *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397 (1976). At bottom, what is left, as a practical matter, is the prospect of sure discipline used to induce stewards to honor the contract and exert their leadership roles to make good faith efforts to get members to do the same. Indeed, in cases of this kind, as the court stated in *Sinclair Oil Co.* v. *OCAW*, 452 F.2d 49, 54 (7th Cir. 1971), "We conclude that the primary remedy of Sinclair is discharge or discipline of individual defendants" (footnote omitted).

With effective discipline being the key remedy available to the employer, its efficacy commands the obligation, as a matter of national labor policy, to have stewards set an example for the rest by not participating in the

unlawful activity and by attempting to bring about its cessation. The steward's compliance would be prodded by the knowledge that his failure to act in this minimally responsible fashion would subject him to the prospect of harsher discipline for failure to exercise the obligations inherent in his position.[15]

The difference between Edison Electric's position and the lower courts, it should be noted, is small. For while the lower courts have parsed contracts with differing results in search of an express obligation of a steward to take steps which if not done subject him to a greater degree of discipline, the approach we propose would recognize that obligation as part and parcel of every no-strike clause and thereby further the goal of uniform national labor policy. When all is said and done, the failure to interpret no-strike clauses in this fashion is likely to give impetus to wildcat strikes and hence undermine the cornerstone of the Act which this Court has sought to protect.

Finally, the position of the Board and the lower courts further works a severe dislocation in sound national labor policy because it pits the Board and courts against a long line of sound arbitral decisions permitting precisely the sort of increased steward discipline involved here. It is of course well settled that a basic feature of federal common law of labor relations developed under the mandate of

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[15] It is no answer to argue that this places the steward in a politically untenable situation *vis-a-vis* his membership. His position is voluntarily assumed with its benefits *and* its obligations. A steward not wishing to accept his obligations can either not accept the position, or act responsibly in accord with its burdens.

Lincoln Mills, supra, is deference to arbitral creation of an "industrial common law . . . of the industry and the shop." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960). In their many years of creating that common law of the shop, arbitrators have traditionally recognized the proposition that a greater measure of discipline is justified against stewards who participate in unlawful strikes because of the implied duty of the steward to set a leadership example for others. Thus, as the arbitrator summed up in *United Parcel Service, Inc.*, 47 LA 1100, 1100 (1966)—a case similar to the subject one:

> If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all of the provisions of the Collective Bargaining Agreement and to actively instruct each employee to do so as well. While it is improper for an ordinary employee to deliberately breach the Agreement, a similar act by a shop steward is untenable and grounds for his discharge. It is the obligation of the steward to set an example for all Union members within his jurisdiction by demonstrating his loyalty to the terms and conditions of the contract negotiated by his Union with the Employer . . ."

The decisions below, it is respectfully submitted, would destroy this "universally recognized"[16] arbitral principle and any uniform national labor policy as well.

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[16] To the same effect, see: *Acme Boot Co.*, 52 LA 585, 588 (1969); *McConway & Torley Corp.*, 55 LA 31, 35-36 (1970); *Herrod Co.*, 66 LA 682, 684 (1976); *Sealright Co., Inc.*, 53 LA 154, 157-158 (1969); *Dresser Industries, Inc.*, 54 LA 956, 958 (1970); *General Fireproofing Co.*, 56 LA 1118, 1125 (1971). Indeed, as the arbitrator stated in *Drake Mfg. Co.*, 41 LA 732, 735 (1963):

CONCLUSION

For the foregoing reasons, the judgment of the court below should be vacated, with the case remanded to the Board to sustain the more severe discipline of the stewards for breach of their implied obligations to honor the no-strike covenant and exert good faith efforts to get members to do the same.

Respectfully submitted,

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But it has long been held that Union leaders owe the highest responsibility to maintain the integrity of the Collective Bargaining Agreement. This responsibility is not discharged by a passive attitude which would allow them to merely be swept along by the tide of rank and file action. Union officers are required to act like leaders in this kind of urgent situation, not merely by words but by action. On the morning of May 22, the grievants were required not only to urge the men to go to work with all the persuasive force they could muster but, even more important, to go to work themselves so that the men could follow their example . . . . [t]he evidence is clear that the grievants utterly failed to meet the high responsibility required by them to maintain the integrity of the Collective Bargaining Agreement.

Amicus Brief

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No. 81-1664

In the Supreme Court of the United States

October Term, 1982

METROPOLITAN EDISON COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF MILLER BREWING COMPANY AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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BRIEF OF MILLER BREWING COMPANY AS AMICUS CURIAE

CONSENT TO FILING

This Amicus Brief is filed, pursuant to Supreme Court Rule 36.2, with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The interest of Miller Brewing Company in this case arises from the fact that it is a party to a case recently decided by the Court of Appeals for the District of Columbia Circuit in which one of the issues presented to this Court was also considered, namely, whether union officials may be disciplined more severely than rank-and-file members for participating in an unauthorized work stoppage. *Miller Brewing Company v. NLRB*, No. 81-1413 (D.C. Cir. August 17, 1982). In that case, the court

held that union officials may not be disciplined more severely for participation in an unauthorized work stoppage.

Because the ruling of the Court of Appeals for the District of Columbia was only recently issued, Miller Brewing Company has not yet taken any action in response. As it does intend to pursue this case further, it takes this opportunity to present arguments to this Court in support of Petitioner, Metropolitan Edison Company, in its effort to obtain a reversal of the decision of the Court of Appeals for the Third Circuit. If the premise on which the underlying decision of the National Labor Relations Board is based, that union stewards may not be held to a higher duty to adhere to the provisions of a collective bargaining agreement, is not rejected, then the ability of Miller Brewing Company and all other employers to discourage and terminate unauthorized strikes will be significantly diminished.

SUMMARY OF ARGUMENT

A well-established principle in the field of labor relations is that union officials have a greater obligation and duty to adhere to the provisions of a collective bargaining agreement than do rank-and-file employees. This principle was recognized by labor arbitrators and the National Labor Relations Board.

In 1977, however, the Board broke with this well-established principle and held that union officials who participate in an unauthorized strike may not be treated any differently than rank-and-file employees who participate in such a strike. This change in position was without authority or explanation and seriously interferes with the methods available to an employer to discourage and terminate unauthorized strikes.

In changing its position, the Board has impermissibly delved into the area of contract interpretation. This is an area in which the Board should not be involved. The interpretation and application of a collective bargaining agreement should be left to the parties to that agreement. Moreover, any dispute involving the interpretation or application of the agreement should be handled under the contract's procedures for resolving such disputes.

The Board's meddling in questions of contract interpretation has resulted in the Board imposing its interpretation of collective bargaining agreements on the parties to those agreements. This is beyond the authority of the Board and should not be allowed.

From a practical standpoint, the "tools" available to an employer to deal with an unauthorized work stoppage in an effective manner are limited. By taking the position that union officials do not have a greater duty to abide by the terms of a collective bargaining agreement and cannot be disciplined more severely than rank-and-file employees, the Board has significantly hampered employers in their efforts to discourage such unauthorized strikes.

ARGUMENT

I.

A Well-Established Principle in the Field of Labor Relations Is That Union Officials Have a Higher Duty to Adhere to the Provisions of a Collective Bargaining Agreement.

The earliest case to consider the question of whether a union official may be disciplined more severely than a rank-and-file employee for participation in an unauthorized work stoppage was *Stockham Pipe Fittings Company*, 84

N.L.R.B. 629 (1949). In that case, an employee, and union official, was discharged for leading and participating in an unlawful work stoppage. In rejecting the General Counsel's assertion that the employer violated the provisions of Sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3) (1976), by disciplining this individual more severely than other participants in the strike, the Board stated:

> [W]e are convinced on this record that Falkner, as the admitted leader of the Local, and as one of the negotiators and signatories to a valid no-strike agreement between the Union and Respondent, had an even greater duty than the rank-and-file employees to uphold its provisions.

Id. at 629.

Similarly, in *University Overland Express, Inc.*, 129 N.L.R.B. 82 (1960), the employer dismissed the shop steward following a walkout that was in violation of the collective bargaining agreement. In finding that the steward was not discriminatorily discharged, the Board echoed its previous decision in *Stockham*: "As the shop steward and one of the contract negotiators, Connor had an even greater duty than the rank-and-file employees to uphold the contract provisions." *Id.* at 92.

One year later, the Board again addressed the question in *Russell Packing Company*, 133 N.L.R.B. 194 (1961). In that case, a work stoppage was instigated by an assistant shop steward who was trying to obtain immediate resolution of various grievances. The chief shop steward instructed all other employees to go back to work and then joined his assistant in attempting to talk to management about the grievances. As a result of the work stoppage, both stewards were discharged. In addressing the legality of the discharge of the chief steward, the Board

acknowledged that he had instructed the other employees to return to work, but found that he had made no attempt to dissuade the assistant steward from pursuing the grievances in an unauthorized manner. As a result of his failure to act, the Board determined that his discharge was appropriate.[1]

In *Super Valu Xenia*, 228 N.L.R.B. 1254 (1977), a strike was called by rank-and-file employees in a vote held outside of the presence of union officials. Following the strike, the employer discharged two shop stewards for their participation in the strike. In finding that there was nothing unlawful in their discharge, the Board noted that there was no evidence, and no contention that the stewards had instigated or lead the strike. The discharges were upheld because the stewards had participated in the unauthorized work stoppage and had consequently failed to fulfill their obligations as stewards.

In *Chrysler Corp.*, 232 N.L.R.B. 466 (1977), the Administrative Law Judge and the Board recognized the significant impact that the participation of a union official in an unauthorized strike has on the rank-and-file strikers. In that case, a line steward informed the chief steward that the employees were intending to walk out the next day in order to conduct a meeting concerning grievances. There was absolutely no evidence that the chief steward was in any way involved with initiating the idea of having a meeting during working hours and conducting a work stoppage.

Obtaining a doctor's excuse for the day of the work stoppage, the chief steward reported to the bar where the meeting was planned to take place. At the meeting, the chief steward took no action to attempt to convince

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1. *See also, Pontiac Motors Division, General Motors Corp.*, 132 N.L.R.B. 413 (1961) (discharge of shop steward unlawful because he did not participate in work stoppage).

the employees to return to work. When a local union vice president came to the meeting to address the employees in an effort to get them to return to work, the chief steward introduced him to the group and attempted to quiet them, instructing them to listen to the local vice president.

In finding that the chief steward's discharge was not a violation of the Act, the Administrative Law Judge noted that the chief steward's presence gave order to an otherwise unstructured gathering. Moreover, the ALJ stated that the employer had every right to regard this chief steward as the leader of any gathering of employees from within his department, especially if no other union officials were present at the time. *Id.* at 474-75. As such, the Board found:

> *Accordingly, in light of considerations relating to his status alone,* in addition to his actions on the afternoon and evening in question, I conclude that Smith not only engaged in an illegal walkout but that his presence provided this action with his active approval and encouragement, not merely negative leadership and that Respondent had ample basis for concluding that Smith exercised a leadership role in the walkout when it determined to discharge him on May 31.

Id. at 475. (emphasis added)[2]

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2. In stating that union stewards are subject to a higher degree of responsibility, it must be kept in mind that the Board has also recognized that because of these special responsibilities, union officials are justified in receiving more favorable treatment than the rank-and-file when this facilitates the discharge of those responsibilities. *E.g., United Auto Workers, Local 1331* (Chrysler Corp.) 228 N.L.R.B. 1446 (1977) (superseniority for overtime shift selection); *Union Carbide Corp.*, 228 N.L.R.B. 1152 (1977) (superseniority for protection against shift transfer); *United Electrical, Radio & Machine Workers, Local 623* (Limpco Manufacturing Co.), 230 N.L.R.B. 406 (1977), *pet. denied sub nom., D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978) (superseniority for protection against layoff).

Over the years, arbitrators have also recognized the principle that union officials have a higher duty to adhere to the provisions of a collective bargaining agreement. Interestingly, the Board's decision in *Stockham Pipe Fittings Company*, 84 N.L.R.B. 629 (1949), concerning the discipline of one union official was not the only review of the employer's actions following the strike. The matter was also addressed by arbitrator Whitley P. McCoy in *Stockham Pipe Fittings Company*, 4 Lab. Arb. 744 (1946). In holding that the employer could discipline officials who participated in an unauthorized strike more severely than the rank-and-file employees, the arbitrator stated:

> Joining other employees in a strike that violates a contract and aiding and abetting afterwards by picketing may be expected of the ordinary member of a union and is not ground for singling him out for penalty. Likewise as to failure to take active steps to end an unauthorized strike. But a different principle is applicable to officers and committeemen of the union. Union office carries with it responsibilities and obligations both to the company and to the union.

Id. at 745-46.

In *Mack Trucks*, 41 Lab. Arb. 1240 (1964), arbitrator Saul Wallen examined a decision by the employer to discipline union officials who engaged in overt acts to instigate or prolong the strike. In rejecting the union's contention that this discriminated against the union officials because of their union status as rank-and-file employees who engaged in the same conduct were not disciplined, Wallen stated:

> Whoever on the union's side subverts this no-strike committment by instigating, leading, condoning or participating in a wildcat strike attacks the fundamental basis of collective bargaining. . . .

> Because he strikes so devastating a blow at the basic aims of both the management and his own union, such a person merits a measure of discipline as severe as any that can be administered for an offense at the industrial code.
>
> . . . .
>
> The union leadership has an especial responsibility to honor the pledged word of the union to abide by the agreement's constraints in exchange for garnering its benefits. The leaders of any organization, in return for the satisfactions of leadership—the sense of power, the rewards of personal satisfaction and the perquisites of the office—must accept the responsibilities as well.

Id. at 1242-43.

In *United Parcel Service*, 47 Lab. Arb. 1100 (1966) (Schmertz, Arb.), the union's contention that it was improper to discipline stewards more severely for their participation in an unlawful work stoppage was rejected in the following terms:

> If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all of the provisions of the Collective Bargaining Agreement and to actively instruct each employee to do so as well. While it is improper for an ordinary employee to deliberately breach the Agreement, a similar act by a shop steward is untenable and grounds for his discharge. It is the obligation of the steward to set an example for all union members within his jurisdiction by demonstrating his loyalty to the terms and conditions of the contract negotiated by his Union with the Employer.
>
> . . . .

> Indeed, a shop steward's duty in the face of an unauthorized strike is well settled. Not only should he make a determined effort to prevent the stoppage before it begins, but upon its development must actively and unequivocally attempt to bring an end to the stoppage at the earliest possible moment.

Id. at 1100-01.

Summarizing the basic picture surrounding the activities of the stewards, Arbitrator Schmertz also stated:

> In short, all the economic conditions bargained and agreed to for a specific term could be negated if the no-strike clause or the arbitration provisions are disregarded. Hence, for shop stewards to be willing or participating parties, or principals themselves, in contravention of either or both of these contract cornerstones, is so obviously inimical to the contract, and so inconsistent with the role of the steward as to require no further elaboration or explanation.

Id. at 1102.

In *International Harvester Company*, 14 Lab. Arb. 986 (1950), arbitrator Ralph Seward examined the employer's policy of singling out union stewards for special discipline in work stoppage cases. There was no evidence that the stewards instigated the work stoppage, but it was uncontested that they participated and made no effort to dissuade others from going on strike. In upholding the employer's practice, the arbitrator stated:

> By virtue of his office a Union steward or committeeman has a special obigation to observe the Agreement. It is his contractually recognized function to protect employees in the grievance procedure against violations of that Agreement by Management. The Agreement gives him special rights and privileges in order

> that he may perform that function. He cannot with impunity turn his back on the very Agreement which it is his duty to defend.
>
> By virtue of his office, further, a Union steward or committeeman is a leader; indeed, it is reasonable to assume that it is because he is a leader that he acquires his Union office. It follows inescapably that when a Union steward or committeeman participates in a work stoppage—making no effort to prevent it or bring it to a close—he is setting an example for the other employees in indicating by his action that the stoppage has his tacit approval and sanction. This is a graver offense than participation by an ordinary employee and justifies a more serious penalty.

Id. at 988.[3]

Based on the foregoing cases, it is readily apparent that the principle that union officials are held to a higher duty to adhere to the provisions of a collective bargaining agreement is firmly established in the field of industrial relations. The Board and arbitrators have recognized the unique position of power and authority union officials have in the day-to-day relations between an employer and its employees. To think that the "mere" participation of a union official in an unauthorized strike has no more effect

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3. Other decisions of arbitrators that support this proposition include: *ITT Thompson Industries, Inc.*, 70 Lab. Arb. 970 (1978) (Seifer, Arb.); *Herrud & Company*, 66 Lab. Arb. 682 (1976) (Keefe, Arb.); *Parker Company*, 60 Lab. Arb. 473 (1973) (Edwards, Arb.); *General Fireproofing Company*, 56 Lab. Arb. 1118 (1971) (Williams, Arb.); *McConway & Torley Corp.*, 55 Lab. Arb. 31 (1970) (Cohen, Arb.); *Southwest Potash Corp.*, 53 Lab Arb. 197 (1969) (Oppenheim, Arb.); *Sealright Company*, 53 Lab. Arb. 154 (1969) (Belcher, Arb.); *Acme Boot Company*, 52 Lab. Arb. 585 (1969) (Oppenheim, Arb.); *Elgin Sweeper Company*, 50 Lab. Arb. 1029 (1968) (Graff, Arb.); *Drake Manufacturing Company*, 41 Lab. Arb. 732 (1963) (Markowitz, Arb.); *Skenandoa Rayon Corp.*, 21 Lab. Arb. 421 (1953) (Feinberg, Arb.)

on rank-and-file employees than the participation of any other employee is to ignore the realities of the workplace.

The Board and arbitrators have acknowledged that because of the authority of union officials, they owe an obligation not only to the union members they represent, but also to the employer with whom their union has entered into a binding contract. The benefits and the power that flow to these union officials do not come free of charge. These officials owe a responsibility to the employer to enforce the collective bargaining agreement and to serve as examples to the union members of how they should conduct their day-to-day work activities under the contract. The failure of these union officials to abide by the terms of a no-strike clause constitutes a breach of the special duties owed to the employer and to the union. It is for this breach, that the Board and arbitrators have held that greater discipline is justified for the participation in an unauthorized strike.

II.

In Its *Precision Castings* Decision, the Board Made an Unexplained Shift in Its Analysis of the Issue of Whether a Steward May Be Disciplined More Severely for Participating in an Unlawful Work Stoppage.

In *Precision Castings Company*, 233 N.L.R.B. 183 (1977), the employer imposed three-day suspensions on five different employees following an unlawful work stoppage. The employer admitted that these employees were suspended because they were union stewards and because they had failed to take any reasonable steps to terminate the work stoppage. The Administrative Law Judge found no violation of the Act. The Board, however, reversed and found that the employer had violated Sections 8(a)(1) and (3) of the Act. The Board rejected the employer's

contention that because each individual held the position of shop steward, he could be held to a greater degree of accountability under the terms of the contract for participating in the strike and determined that this was discrimination directed against an employee on the basis of the holding of union office. The Board, however, made no effort to explain its departure from the well-established principle discussed above.

In *Indiana and Michigan Electric Company*, 237 N.L.R.B. 226 (1978), *enf. denied*, 599 F.2d 227 (7th Cir. 1979), the employer discharged four union stewards and one union official who participated in an unauthorized work stoppage. Based upon the Board's decision in *Precision Castings, supra*, the Administrative Law Judge held that the employer had unlawfully discriminated against these union officials. The Board affirmed without comment.

Shortly thereafter, in *Gould Corporation*, 237 N.L.R.B. 881 (1978), *enf. denied*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980) the Board again confronted the question of whether a union steward could be disciplined more severely for his participation in an unlawful work stoppage. The Board, in a three to two decision, determined that this violated the provisions of Sections 8(a)(1) and (3) of the Act because the employee was discharged not because of his actions as an employee, but because of his lack of actions as a steward. According to the Board, this was a "legally impermissible criterion" for imposing discipline.

This decision, however, was the first indication that not even the members of the Board could agree that the principle of *Precision Castings* was a proper statement of law. In analyzing the decision in *Precision Castings*, Member Truesdale could find no clear Board precedent

to support it. Moreover, Member Penello, in a stinging dissent, criticized the Board for a decision that was contrary to the law and to logic. According to Member Penello, the majority's approach of finding that the employer had disciplined these employees solely because they were union stewards was incorrect. Penello argued that more severe discipline was appropriate because the union stewards had failed to fulfill their contractual duties to take action to end the work stoppage.[4]

Member Penello summarized his concerns with the decision of the majority in *Gould*, and the previous decision of the Board in *Precision Castings* as follows:

> To summarize, my colleagues of the majority have reached a decision today which contravenes the directions of Congress, the courts, prior Board decisions, and the consistent arbitral interpretation of the collective bargaining agreement. In support of its position, the majority has taken an erroneous view of the facts and has engaged in an incorrect application of the law. As a result, the majority has endangered the very foundation of our collective-bargaining system. As noted above, no single factor contributes more to peaceful labor-management relations than the grievance-arbitration system with its companion no-strike clause. Yet employers are being told today that, in return for their promise to submit all disputes arising under their collective-bargaining agreements to the grievance-arbitration procedure, they are getting absolutely nothing in return. For if union stewards are permitted to engage in unauthorized, illegal work stoppages and not be subject to discipline for

4. In reaching this conclusion, Member Penello noted not only the previous decisions of the Board, but also the significant amount of arbitral authority supporting this principle.

> failing to comply with their affirmative contractual duties to end such stoppages, the no-strike provision is essentially a nullity as far as the employer is concerned. Not only will industrial peace at the workplace be threatened by the specter of wildcat strikes, but the negotiation of collective-bargaining agreements will also be severely hindered as employers become less willing to concede grievance-arbitration clauses when they know that they will be getting very little in return.

Id. at 887.

A decision closely related to the above line of cases is *Midwest Precision Castings Company*, 244 N.L.R.B. 597 (1979). In that case, the employer and the union had a collective bargaining agreement that included a provision prohibiting strikes, boycotts, or slow downs during the period of the agreement. During this time it came to the employer's attention that one of the shop stewards had told a fellow employee that she was working too fast and should slow down. The steward contended that this comment had been made in a joking manner and the investigation by the employer indicated that this comment was frequently made in a joking manner by other employees. The employer, however, determined that stewards could not joke about such things and disciplined the offending steward. There was no evidence that any other employee had been disciplined for making similar comments regarding slowing down.

Relying on the Board's previous decision in *Precision Castings* and *Gould*, the Administrative Law Judge found that the discipline of the steward was in violation of Sections 8(a)(1) and (3) of the Act. The Board, however, reversed and distinguished the case from that of *Precision Castings* and *Gould*. According to the Board,

the record revealed that although the steward testified that she was joking when she made the comment, the employee took the comment seriously and did, in fact, slow down. As such, the Board reasoned that this was tantamount to leadership of the slow down and thereby distinguished this case from that of *Precision Castings* and *Gould*.

In an effort to explain away the apparent inconsistency with its previous decisions in *Precision Castings* and *Gould*, former Chairman Fanning stated that the discipline of the steward in this case was connected with the steward's status only to the extent that the status colored the impact of her action. Accordingly, the status of the steward would tend to lend credibility to the statement. Thus, the employer was justified in considering these unprotected comments to be more serious than if they came from rank-and-file employees. In a concurring opinion, Member Penello again took the opportunity to attack the Board's previous decisions in *Precision Castings* and *Gould* and chastised the Board for its attempt to distinguish these two cases:

> In making this distinction, my colleagues have ignored the crucial role played by a union steward in the administration of a collective bargaining agreement. By the very nature of his position with the union a steward occupies a position of some authority *vis-a-vis* his fellow employees, and those employees will of necessity look towards the steward for guidance and leadership on any issue which arises on a daily basis in the plant. . . . [I]f employees are contemplating the withholding of their services from their employer by engaging in a work stoppage or work slow down they perforce will seek the advice and guidance of their union steward on a matter of such

> crucial importance to their employment. If under such circumstances a union steward joins his fellow employees in an illegal, unauthorized work stoppage logic dictates that the steward should be viewed as the 'leader' of such a work stoppage.

Id. at 600-01.

Member Penello correctly points out that the Board's decisions in *Precision Castings* and *Gould* cannot be reconciled with the decision in *Midwest Precision Castings*. Essentially, the Board is saying that the steward in the latter case could be disciplined because her status as a steward gave respectability and credibility to her comments regarding a work slow down and, thus, she was the leader of the slow down. Yet, in the former cases, the Board failed to realize that the participation of the steward in the work stoppages also lent credibility and respectability to the work stoppage, thereby enhancing the nature of the participation of the steward and justifying the more severe discipline.

The Board's struggle with the *Precision Castings* rule continued in *Rogate Industries, Inc.*, 246 N.L.R.B. 898 (1979). In that case, the employer discharged five union officials for their participation in an unauthorized strike. Although the Administrative Law Judge determined that there were no other employees who had any greater involvement than those that were discharged, he determined that the discharges were motivated by the employees' status as union officials and held that the employer had violated Sections 8(a)(1) and (3) of the Act.

The Board's decision demonstrated the difficulty that it was having with the principles of *Precision Castings*. Two members of the Board specifically stated that they would overrule *Precision Castings* and dismiss the com-

plaint. Two other members of the Board would have upheld the Administrative Law Judge's decision. The swing vote that resulted in the reversal of the Administrative Law Judge reasoned that because there were no other employees who had any greater involvement in the strike activity than those who were discharged, the employer had acted in accordance with the law in disciplining them in a more severe manner.

Subsequent to this decision, however, the Board has settled into a more predictable routine in examining cases involving the discipline of union officials for participation in unlawful strikes. In the case presently before this Court, *Metropolitan Edison Company,* 252 N.L.R.B. 1030 (1980), *enforced,* 663 F.2d 478 (3d Cir. 1981), *cert. granted,* No. 81-1664 (June 14, 1982), the Board, in a two to one decision, continued to adhere to the principles of *Precision Castings.* In addition, the Board also rejected the employer's assertion that a series of previous arbitration decisions that had held that stewards had a higher duty under the collective bargaining agreement justified the discipline. Moreover, in a case involving Amicus Curiae in this case, the Board also determined that the Act had been violated when two union stewards were discharged for their participation in an unauthorized strike. *Miller Brewing Company,* 254 N.L.R.B. No. 24 (1981), *enforced,* No. 81-1413 (D.C. Cir. August 17, 1982).[5]

III.

The Courts of Appeals Have Consistently Rejected the Board's *Precision Castings* Principle.

The Court of Appeals for the Seventh Circuit was the first court to address the Board's *Precision Castings*

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5. Again, the Board paid no attention to the fact that an arbitrator had upheld the discharge.

rule. In *Indiana and Michigan Electric Company v. NLRB*, 599 F.2d 227 (7th Cir. 1979), the court succinctly stated the issue as follows:

> The issue in this case is whether disciplining union stewards and a union officer more severely than rank-and-file employees for participation in an unlawful strike was inherently destructive of important employee rights and hence a violation of §§ 8(a)(3) and (1) of the National Labor Relations Act, . . . regardless of business justification and absence of anti-union motivation.

Id. at 228.

In analyzing this issue, the court first noted that the Board has determined that a union office " 'embodies the essence of protected concerted activities.' " *Id.* at 230. The court, however, was quick to point out that this was not a situation in which the disciplining of union officials would in any way deter them from participating in *valid* union business:

> Employer action that would impair some right or restrict some legitimate activity of union officials and thereby discourage members from holding union office would no doubt have an inherently adverse effect on employee rights. The same is not true, however, of employer action that at most deters union officials from deliberately engaging in clearly unlawful conduct that is both a violation of their duties as employees and union members and a repudiation of their responsibilities as union officials.

Id.

The court rejected the Board's proposition that the more severe discipline was premised solely on the status

of the employees as union officials. According to the court, the more severe punishment was based upon the employees' breach of the higher responsibility that accompanied their status as union officials, "a breach that makes their misconduct more serious than that of the rank-and-file." *Id.* Moreover, the court reviewed the precedent that allegedly gave the Board the foundation for its decisions in *Precision Castings, Gould,* and the case it was currently reviewing, and determined that these decisions represented a departure from prior law.

Based upon its review of the law underlying the Board's decision, the court determined that an employer may differentiate between union officials and rank-and-file employees in accessing discipline for participating in a clearly unauthorized strike. According to the court, this in no way interferes with, penalizes, or deters the exercise of any protected employee right. As such, the employer was entitled to consider the union officers' greater responsibility and greater fault in determining the appropriate penalty. Therefore, enforcement of the Board's order was denied.

In *Gould, Inc. v. NLRB,* 612 F.2d 728 (3d Cir. 1979), *cert. denied,* 449 U.S. 890 (1980), the Court of Appeals for the Third Circuit also rejected the Board's *Precision Castings* analysis. Following a critical analysis of the Board's decisions that predated its decision in *Precision Castings,* the Third Circuit stated its complete agreement with the Seventh Circuit that there can be no prejudice to employee rights when an employee is deterred from engaging in illegal activity:

> As for the contention that as a result of this ruling prospective stewards will be dissuaded from seeking union office, the obvious and short answer is that they should be deterred from seeking office if they

> intend thereafter to participate in illegal work stoppages or to repudiate contractual obligations which were freely negotiated and voluntarily assumed. The company's action and our ruling deters no other kind of 'union' activity.

Id. at 733-34.[6]

The Court of Appeals for the Eighth Circuit has also rejected the Board's rule of law established in *Precision Castings*. In *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51 (8th Cir. 1981), the court upheld the suspension of the members of the union committee following their participation in an unlawful work stoppage:

> [T]here is a crucial distinction between discipline which is imposed because of union affiliation or office and discipline which is imposed for acts, otherwise punishable, which were committed or omitted while exercising union affiliation or office. . . . Here, the union executive committee members were suspended not because of their status as union officers but because of their acts and omissions to act while holding union office.

Id. at 55.

In *C. H. Heist Corp. v. NLRB*, 657 F.2d 178 (7th Cir. 1981), the Court of Appeals for the Seventh Circuit had another opportunity to examine the Board's *Precision Castings* principle. In that case, the Board found that the employer had committed an unfair labor practice by discharging a union steward following his participation

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6. Although ignored by the Board, the court also noted that the contract provided that union officials should take positive steps to end illegal work stoppages. In *Hammermill Paper Co. v. NLRB*, 658 F.2d 155 (3d Cir. 1981), the court, in a split decision, restricted its decision in *Gould* by requiring that the anti-strike obligations be contained in the contract.

in an unlawful work stoppage, despite his aggressive efforts to terminate the work stoppage. In reviewing the facts of the case, the court found that the steward had met his obligations under the collective bargaining agreement to dissuade the employees from striking and that there was no requirement that the steward cross the picket line in order to carry out this duty. Moreover, the court noted that in its previous decision in *Indiana and Michigan Electric Company, supra,* only three of the five union officials even attempted to persuade the employees to stop the strike, and they did so belatedly.

Because the steward had done just about everything possible to end the strike, the court found that he could not have been discharged because he had breached any "higher responsibilities" imposed upon him. As such, the court held, that he had been discharged solely because he was the union steward during the strike. Thus, although the court did not adopt the strict *Precision Castings* principle, it enforced the Board's order.

In the case currently under review, the Court of Appeals for the Third Circuit determined that a series of arbitration decisions interpreting the same no-strike language in previous contracts to impose a higher standard of responsibility on union officials to end a wildcat strike did not constitute a defense to the charge that the more severe discipline of union officials for participating in an unlawful strike was a violation of the Act. As a result of this determination, the court held that the collective bargaining agreement itself must specfiy that union officials have some responsibility to try to end an unauthorized work stoppage before the company may impose any greater discipline on the union officials than other participants in the strike. 663 F.2d at 482. Despite the enforcement of the Board's order, however, the court continued to reject the Board's *Precision Castings* principle.

In *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982), a union official was given a 10 day suspension for participating in an unlawful work stoppage. Other participants were given five day suspensions. On its face, the collective bargaining agreement did not state that union officials were under a higher standard of responsibility to uphold the provisions of the agreement. A previous arbitration decision involving a similar set of circumstances, however, did interpret the contract as imposing higher standards on union officials. Thus, the arbitrator found in the earlier case that the enhanced discipline was authorized under the contract. In analyzing the effect of the previous arbitration decision on Fournelle's discipline, the court stated the question as follows:

> The remaining question is whether the [arbitration] award should have been accorded precedential effect by the Board. If the award should be given precedential effect, our inquiry need go no further: if the collective bargaining agreement authorized Bethlehem's selective discipline of Fournelle, then . . . the Board erred in finding that discipline to constitute an unfair labor practice.

Id. at 343.

This was further refined by the court:

> The question here is whether, on the one hand, the Board and courts should read the agreement in accordance with the clear ruling of the arbitrator or, on the other hand, should substitute their interpretation for the arbitrator's.

Id. at 344.

These questions were quickly answered by the court when it held that:

> [T]he Board was not free either to ignore the meaning of the contract or to substitute its own interpretation of the contract for the interpretation of the arbitrator. . . . The Board's intervention in such a case was an impermissible attempt to decide 'a contractual claim that [did] not involve an unfair labor practice.'

Id. at 345.

The above-quoted passages from the court's decision establish that the thrust of *Fournelle* is that when an arbitrator has interpreted a contract to authorize certain actions, it is not within the Board's authority to ignore this interpretation and give the contract a different meaning. Moreover, it is clear that when the question presented is whether the contract arguably allows the employer to take the action that it did, the problem is taken out of the realm of an unfair labor practice.

As is clear from the above line of cases, the appellate courts have unanimously rejected the Board's decision in *Precision Castings*. The Board's approach is similar to that of an ostrich, as it buries its collective head in the sand to avoid the realities of labor-management relations. Union officials exercise a significant amount of influence over their subordinate members and their actions often speak louder than their words. Moreover, they have an obligation to the employer to ensure that there is compliance with the collective bargaining agreement.

When union officials even passively participate in an unauthorized strike, they send a message to the membership that the unlawful conduct will be tolerated and condoned. When they make no sincere effort to deter or terminate an unauthorized strike, they support this view and they violate the obligation they owe to the employer.

Under these circumstances, the more severe discipline is appropriate.

IV.

The Board Has Become Impermissibly Involved in the Interpretation of Collective Bargaining Agreements.

Under the principle established by the Board in *Precision Castings*, the Board is able to become far more heavily involved in the interpretation of contracts than was ever intended. This involvement will enable the Board to assert its beliefs concerning the interpretation of contract rights and thereby participate in the formulation of precedent under the contract. As said by the Court of Appeals for the District of Columbia: "The Board's interpretation of such a case was an impermissible attempt to decide 'a contractual claim that [did] not involve an unfair labor practice.'" *Fournelle v. NLRB*, 670 F.2d at 345.

As noted by this Court in analyzing the Board's ability to interpret contracts:

> When Congress determined that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements . . ., it was acting upon a principle which this Court has already recognized. . . . To have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements. We view Congress' decision not to give the Board that broad power as a refusal to take this step.

NLRB v. C & C Plywood Corp., 385 U.S. 421, 427-28 (1967).

The proper and congressionally mandated method for resolving problems concerning the interpretation of a collective bargaining agreement is the contract's grievance and arbitration machinery. It has long been recognized that final and binding grievance arbitration contributes significantly to the attainment of the primary objective of the Labor Management Relations Act to promote industrial peace and stability by encouraging the practice of collective bargaining. In 1947, Congress expressed its approval of the use of this voluntary dispute settlement mechanism by adding Section 203(d) to the Act, which provides in pertinent part: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for the settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . . ." 29 U.S.C. § 173(d).

As this Court has stated, the policy of Section 203(d) "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers v. American Manufacturing Company*, 363 U.S. 564, 566 (1960). Moreover, this Court has also stated:

> The present federal policy is to promote industrial stabilization through the collective bargaining agreement. . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.

United Steelworkers v. Warrior & Gulf Navigation Company, 363 U.S. 574, 578 (1960).

In more recent decisions, this Court has continued to emphasize the congressional policy of promoting the peaceful settlement of labor disputes through arbitration. *See, e.g., Buffalo Forge Company v. United Steelworkers*, 428

U.S. 397 (1976); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

Although it is recognized that the Board has been given an extremely important and difficult task in its responsibility for carrying out the policies of the Act, it must be noted that the Board has previously been cautioned that it is also required to consider other equally important policies in carrying out its duties:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate tasks.

Southern Steamship Company v. NLRB, 316 U.S. 31, 47 (1942).

In its enthusiasm to find jurisdiction wherever it can, the Board has lost sight of the policies underlying the Act. It has attempted to insert itself into the collective bargaining process in a way that can only lead to a weakening of the grievance and arbitration system. The simple fact of the matter is that cases of this nature do not involve an unfair labor practice and the Board should not interfere.

V.

Other Remedies for Wildcat Strikes Are of Limited Value.

As noted by Justice Powell in his concurring opinion in *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 417

(1981) (Powell, J., concurring), the remedies available to an employer to counteract "wildcat" strikes are of extremely limited value. In a true wildcat strike, damages cannot be obtained from the union. *Carbon Fuel Company v. United Mine Workers*, 444 U.S. 212 (1979).[7] Moreover, this Court has held that Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, does not authorize a damages action against individual union members when their unauthorized, individual action violated the no-strike clause of a collective bargaining agreement. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981).

Unless the employer can fit within the narrow exemption granted by *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) and *Buffalo Forge Company v. United Steelworkers*, 428 U.S. 397 (1976), injunctive relief is barred by Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104. Even if such a remedy is available, the length of time necessary to obtain an injunction significantly diminishes the deterrent effect of this remedy.

The main remedy and principal deterrent to true wildcat strikes is the discipline of the participants. As noted by Justice Powell, however, in a large wildcat strike, wholesale discharges are not practical because of the crippling effect on production. Selected discipline of strike instigators is not generally a viable option as it is often impossible to identify the instigators. Moreover, although the union often has the authority to discipline members who participate in unauthorized strike activity, it normally will not discipline such individuals. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 421-22 (Powell, J., concurring).

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7. Even if the strike is authorized, local unions are likely to be judgment proof and international unions not likely to be provably involved.

Because of these problems, the only effective deterrent measure that is available to the employer is the threat of discipline of union officials who participate in unauthorized work stoppages. With this authority, the employer can impress upon the union officials the importance of their obligation to help maintain the provisions of the collective bargaining agreement. In addition, it will demonstrate to the rank-and-file the importance of the no-strike commitment. To remove this option from the employer, is to remove any effective means of dealing with the possibility of wildcat strikes.

CONCLUSION

Amicus Miller Brewing Company respectfully submits that for the above stated reasons, this Court should reverse the decision of the United States Court of Appeals.

Respectfully submitted,

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Docket Sheet

NO. 81-1664-CFX	TITLE Metropolitan Edison Company, Petitioner v. National Labor Relations Board, et al.

DOCKETED	COURT
Mar. 4, 1982	United States Court of Appeals for the Third Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Anthony A. DeSabato
	Counsel for Respondents: Solicitor General, Paul Alan Levy
Mar. 4, 1982	Petition for writ of certiorari filed. (Record filed).
Mar. 4, 1982	Appendix filed.
Apr. 6, 1982	Order extending time for the Government to file a response to the petition until May 3, 1982.
May 3, 1982	Brief for respondent Local 563 in opposition filed.
May 4, 1982	Brief for respondent NLRB in opposition filed.
May 5, 1982	DISTRIBUTED. 5-20. (Stricken)
May 26, 1982	DISTRIBUTED. 6-10.
June 14, 1982	Petition GRANTED.

July 8, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until Aug. 28, 1982.
Aug. 27, 1982	Joint appendix filed.
Aug. 27, 1982	Brief for the petitioner filed.
Aug. 30, 1982	Brief, amicus curiae, of The Chamber of Commerce of the United States filed.
Aug. 30, 1982	Brief, amicus curiae, of The Edison Electric Institute in support of petitioner filed.
Aug. 30, 1982	Brief, amicus curiae, of Miller Brewing Company filed.
Sept. 8, 1982	Motion of the Solicitor General for divided argument filed.
Sept. 23, 1982	Order extending time to file the respondents' briefs on the merits until October 30, 1982. For all respondents.
Oct. 4, 1982	The motion of the Solicitor General for divided argument is GRANTED.
Oct. 29, 1982	Brief for respondent National Labor Relations Board filed.
Oct. 30, 1982	Brief for respondent Local Union 563, IBEW filed.
Nov. 17, 1982	CIRCULATED.
Dec. 30, 1982	Reply brief for the petitioner filed. (D).
Jan. 11, 1983	ARGUED.